(1) Supreme Court, U.S.
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No. 04-1458 APR 19 2004

In the Supreme Court of the United States

ROBERT PETIT, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Statement

The Court of Appeals affirmed summary judgment for the City of Chicago (the "City"), for imposing mechanical quotas for blacks and Hispanics for career promotions to sergeant of police, to the detriment of applicants of all other races and ethnicities, deferring to the City's defense that it needed more diversity.

I. Whether the Court of Appeals wrongly extended this Court's decision in Grutter v. Bollinger, 123 S. Ct. 2341 (2003) and Gratz v. Bollinger, 123 S. Ct. 2411 (2003), allowing the use of race for diversity for entrance into educational institutions, to race-based career promotions, in conflict with other lower court decisions?

II. Assuming race can be used for diversity for career promotions, whether the Court of Appeals wrongly did not apply the narrow tailoring limits of Grutter-Gratz, where:

(1) the City imposed mechanical quotas based on the black race and Hispanic ethnicity, by

a. first, altering or "standardizing" scores by race and Hispanic ethnicity, to make the selection rates of blacks and Hispanics equal to 100% of the selection rate of the non-black, non-Hispanic group,

b. second, adding 56 out of order promotions to fulfill an extra 10% quota for Hispanics, who already benefitted from the altered scores, and a 20% quota for females which benefitted black and Hispanic

females only, due to the racial score alterations that harmed white females,

(2) the City gave no individualized consideration to applicants, and gave no weight to diversity factors besides race,

(3) the City used the quotas to benefit largely black and Hispanic males, who were already fully represented in the sergeant rank, passing over severely underrepresented groups, such as white women, Asians, and American Indians,

(4) the City's use of race was not temporary, due to 20 years of prior quotas, and

(5) the City harmed 82 petitioners, which the Court of Appeals affirmed had standing to sue?

III. Whether the Court of Appeals wrongly held that narrow tailoring was met by mechanically altering or "standardizing" scores, where :

(1) the district court had given summary judgment to petitioners and against the City on its defense that it altered scores to eliminate adverse impact, and the City withdrew its conditional cross appeal on its adverse impact defense,

(2) the district court found that the City promoted 42 blacks and Hispanics over the number needed to eliminate adverse impact, and no justification was offered for the extra 56 out of order promotions, made on top of score alterations,

(3) adverse impact has no logical relationship to an operational need for diversity,

(4) the City stated its test was job-related, the minorities who participated in the job development were given disproportionate voting on the relative importance of tasks, a black psychologist made the test, the City eliminated test items that did not pass a reliability quotient, and the scores were not close, and

(5) under Watson v. Fort Worth Bank & Trust, 487 U.S. 977, adverse impact does not justify race preferences, and formal validation studies are not required?

IV. Whether the City had the right to use race or ethnic origin for any reason, including diversity, where the collective bargaining agreement barred the use of race and ethnic origin in employment decisions?

V. Whether the Court of Appeals wrongly affirmed the dismissal of 244 of 326 petitioners based on standing to sue?

VI. Whether, if this case is remanded for trial, the jury should neither be instructed that petitioners have to prove negatives for the City's remaining two defenses, nor that a discriminatory effects interest is already established?

PARTIES TO THE PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit of December 15, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 352 F.3d 1111 (7th Cir.2003). It is reprinted in the Appendix. (A-3a) By order of January 22, 2004, the Court of Appeals denied the petition for rehearing. (A-1a)

The Seventh Circuit had affirmed the opinion of the United States District Court Judge William Hart, which is not reported, and is reprinted in the Appendix. (A-28a, 16a)

JURISDICTION

On December 15, 2003, the Court of Appeals for the Seventh Circuit entered the judgment sought to be reviewed. On January 22, 2004, the Court of Appeals denied the petition for rehearing. This Court has jurisdiction under 28 U.S.C Sec.1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, sec. 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Parties

Petitioners, officers of the Chicago Police Department (CPD), sued the respondent City of Chicago ("the City"), under 42 U.S.C. 1983, the enforcement statute for the Equal Protection Clause of the United States Constitution. (R-45, Count I) The City had given quotas to applicants who were of the black race, or who had at least one grandparent who was Hispanic, on the 1988 sergeant list, for 1988-1991 promotions. (Supp. record-City's trial ex. 40) (Pl trial ex. 25. p.3) The petitioners are female and male, and of many races and ethnicities.

For the quotas, the City categorized all non-blacks and non-Hispanics as "white", no matter what their race or ethnic group, including Asians and American Indians, which the Court of Appeals called a "bizarre move" (A-12a) (City's trial ex. 10, p.2) When various sergeant candidates tried to change their race or ethnicity from "white" to such classifications as Pacific Islander or Polish, the City refused to do so. (Supp. Record-Pl. trial ex. 26)

Collective Bargaining Agreement

The contract between the City and the police officers' union, the Fraternal Order of Police, Lodge #7, barred the use of race and national origin in employment decisions. (A-6a)

Background

Police Officer hiring quotas

For the 1971 CPD hiring test, United States District Court Judge Prentice Marshall ordered quotas for black and Hispanic males at 42%, when these groups were 20% of the general population, U.S. v. City of Chicago, 411 F. Supp.218, 242, 248-250 (1976).

The Court of Appeals reversed Judge Marshall's finding of purposeful racial discrimination:

> "We reverse the district court's holding of a constitutional violation as to racial discrimination .... "There is no evidence in the record before us that the Chicago Police Department engaged in purposeful discrimination." U.S. v. City of Chicago, 549 F.2d 415,435 (7th Cir.1977)

For the 1975, 1982 and 1986 hiring lists, the City continued to impose quotas voluntarily. (A-66a-69a). (Supp. Record, Pl. trial exs. 34, 38 & 39)

Sergeant promotion quotas

For the 1973 and 1978 sergeants' lists, Judge Marshall imposed 40% quotas for black and Hispanic males, -- double the applicant pool of black and Hispanic males who took those tests. U.S. v. City of Chicago, 411 F.Supp.218, 243, 250 (1976), aff'd, 549 F.2d 415; 663 F.2d 1354, 1361 (7th Cir. 1981). (Supp. Record- Pl. trial exs.34, 38, 39,44,46) (Trial Tr. 1/16/02 at 174-79)

In 1981, parity had been achieved between the patrol force and sergeants' rank. Quotas for black and Hispanic males for sergeant continued at a rate of 25%, U.S. v. City of Chicago, 663 F.2d 1354, 1361 (7th Cir. 1981).

Past intentional exclusion of females

Before 1975, women had been intentionally excluded from the CPD. U.S. v. City of Chicago, 411 F. Supp. 218, 229-30 (1976) 549 F.2d 415 at 434, 435 (7th Cir. 1977) As a result, before the 1988-91 sergeant promotions, women were only 2.3% of the sergeant rank. (City's trial ex. 61, p.2)

Racial balance before the sergeant promotions at issue

Before the 1988 sergeant promotions, applicants whom the City put in the "white" group, included applicants of severely underrepresented groups, such as white women, Asians and American Indians. In 1988, there were 26 white female sergeants, and 3 Asian and American Indian sergeants, out of 1176 total sergeants. (Pl trial ex. 68)

As set out on the following chart, before the December, 1988 sergeant promotions, according to the City's Affirmative Action Plan and its operational strength report, the percentage of black males in the CPD exeeceded their percentage in the population, and black males were overrepresented in both the police officer and the sergeant ranks. Before the 1990 sergeant promotions, City Personnel Commissioner Glenn Carr, who himself is black, declared that black and Hispanic males were near parity, that "additional affirmative action promotions of Black males to that [the sergeant] rank are no longer remedially necessary" and that there were only "slight disparities" for Hispanics". (Trial Tr. of 1/16/02 at 122) (City's trial ex. 10, p.2 and p.3 n.1) The quotas continued.

1988
Black males

	number	percentage
external labor force		16.3%
Police officer	1743	20.0%
Sergeant	259	22.0%

Hispanic Males

	number	percentage
external labor force		6.4%
Police officer	479	5.6%
Sergeant	40	3.4%

(R. 252, Ex. A and Supp. Rec., Pl Trial ex. 57 & 68)

1990
Black males

	number	percentage
Police officer	1927	18.8%
Sergeant	263	22.4%

Hispanic Males

	number	percentage
Police officer	541	5.3%
Sergeant	58	4.9%

(City's trial ex. 10, p.2 and p.3. n.1)

Contemporaneously with the sergeant promotions, the City was making race and ethnic based promotions to lieutenant from the 1988 lieutenant list, so blacks and

Hispanics were giving up sergeant positions for higher rank, U.S. V. City of Chicago, 870 F.2d 1256, 1258 (7th Cir. 1989).

Court disapproval for quotas from 1988 sergeant list

No court order sanctioned the altered scores, nor the extra out of order promotions, for the 1988 sergeant list at issue.

On November 21, 1988, before the City promoted from the list, Judge Marshall stated he was ending his approval of promotion quotas designed to make sergeant ranks reflect the rank below, calling such quotas an "anathema" and "vexatious" :

> "We have concluded that the time has come to end court imposed promotion quotas with respect to the rank of sergeant..." (Supp. Rec.-Pl.trial ex. 28, p.8)

Judge Marshall also said that he was not judging the validity of the City's scoring methods on the 1988 sergeant list at issue. (Supp. Rec.- Pl. trial ex. 28, p.7)

In U.S. V. City of Chicago, 870 F.2d 1256, 1258 (7th Cir. 1989), the Court of Appeals denounced Judge Marshall's directions to the City, for another police promotion test, to "have them arm wrestle or anything", to reach pre-determined pass rates by race. The Court of Appeals stated:

> "The City cannot shield itself from liability by invoking Judge Marshall's approval of promotions based on the altered results..." Id. 870 F.2d 1262

Challenged conduct/goal

For promotions from the 1988 sergeant list at issue, the City formulated a goal to promote blacks and Hispanics to reach a quota of 120% of eligible blacks and Hispanics. (City's trial ex. 10, p.3)

To meet the quotas, the City first altered or "standardized" scores, to make the selection rates of blacks and Hispanics equal to 100% of the selection rate of the non-black, non-Hispanic group. (A-98a-100a) (City's trial exs. 40 & 52-see Supp. Rec. for colored coded list)

Second, the City added 56 extra out of order promotions to fulfill an extra 10% quota for Hispanics, who already benefitted from the altered scores, and a 20% quota for females which, in practice, was an added quota for black and Hispanic females, since the City first altered the scores by race to the detriment of females who are "white". (City's trial ex. 61, p.4 &) The few "white" females picked up by the out of order promotions would have been promoted anyway, if scores had not first been racially altered. Other "white" females, including some petitioners, never got the promotions they would have received, if the City had not altered scores by race and added the extra 56 out of order promotions. (Supp. Rec., Pl. trial ex. 20-1 to 6, City's trial ex. 62)

From 1988 to 1991, the City promoted 458 candidates from the 1988 altered sergeants' list, on five dates:

December 1988:	257	(including 12 out-of order)
August 1990:	69	(including 12 out-of order)
December 1990:	46	(including 11 out-of order)
February 1991:	64	(including 15 out-of order)
September 1991:	22	(including 6 out-of order)

(R-323, Ex. B)

In total, the City promoted twice as many blacks and about two and a half times as many Hispanics as it would have promoted without altered scores and out of order promotions, as follows:

a) 119 blacks (109 after racial alteration of scores and another 10 out of order and

b) 41 Hispanics (17 after the racial alterations of scores and another 24 out of order.

(A-100a-101a) (R-328, Pre-trial order, sched. B, City's proposed fact #135)

City's defenses

For court, plaintiff's *prima facie* case was not contested, and the City had asserted three defenses:

(1) "discriminatory effects of past discrimination"

(2) "adverse impact".

(3) "operational need for diversity".

Judgment of the district court

After a mistrial due to a hung jury, the parties brought motions for judgment as a matter of law, treated as motions for summary judgment. (R-333, 335, 336, 340, 346)

By judgment of October 23, 2002, the district court ruled on the City's three defenses as follows:

(1) "discriminatory effects of past discrimination"

The district court gave judgment to neither party on the "discriminatory effects of past discrimination" defense. (A-76a, 94a-95a)

(2) "adverse impact"

The district court granted summary judgment to petitioners, and against the City, on the "adverse impact" defense. The district court found, that the City went well beyond bringing the selection rates of blacks and Hispanics up to 80% of the selection rates of "whites", so the alteration of scores was not narrowly tailored as a matter of law. (A-96a-104a) The City withdrew its conditional cross-appeal on that defense.

The City stated that it had developed a job-related test, based upon representative tasks or behaviors important to the job, linked to KSA's (knowledge, skills and abilities). (R-328, Pre-trial order, sched. B, City's proposed facts #123,#124) The minorities who participated in the job development were given disproportionate voting on the relative importance of tasks. (R. 332)

The City's only test consultant was a black psychologist, Curtis Banks. The City eliminated test items that did not pass a reliability quotient, and voluntarily choose not to conduct any other formal validation studies. (Trial Tr. of 1/22/02 at 165, 175-179, 208-209)

The scores were not close. The lowest scoring black and Hispanic, who were promoted, scored five points worse than "whites" passed over. Without racial standardization, the lowest scoring Hispanic promoted scored 78.68, and the lowest scoring black promoted scored 79.98. The highest scoring "white" plaintiff, not promoted, scored 84.39. The highest scoring "white" female plaintiff, not promoted, scored 83.31. (Pl's trial ex. 20-5, based upon City's trial exs. 40 & 52-see Supp. Rec. for color coded chart)

(3) "operational need for diversity"

The district court granted summary judgment to the City only on the operational need for diversity defense. (A-77a-90a)

The evidence was as follows:

Superintendent' views

When Leroy Martin, the Superintendant of Police at the time, who is black, was specifically asked if the make-up of the work force was an operational factor, he responded that the make-up was a problem for assignments to detective, tactical units, undercover work, and district commanders, which are not sergeant positions. When asked if he had exhausted his answer, Martin said yes. (A-131a-139a, R.366, Ex. E)(Trial Tr. of 1/29/02 at 41-42)

Martin, and his successor, Superintendant Terry Hillard, who is also black, said that whites work effectively in solving crime and communicating in black and Hispanic communities. Hillard said: "I don't correlate people skills to race...". (A-139a, R.366, Ex. E, p.124) (Trial Tr. of 1/28/02 at 144, 154-55, 168) (Trial Tr. of 1/29/02 at 42)

Martin and Hillard did not support the City's division of officers and residents as black or Hispanic, with all other races and ethnicities considered "white". They said that Chicago was a "melting pot", a "microcosm of the United Nations, with all the different races and ethnic and cultural groups", since its residents include many races, religions and ethnicities, including Polish, Arab, Asians, American Indians, Mideastern peoples, Russian Jews, Greeks and others. They noted that immigrant groups speak languages other than Hispanic, such as Polish. Martin said that "You're going to have to have a multitude of various officers to address the various needs of these communities". (Martin: Trial Tr. of 1/29/02 at 50, 51, 53,61) (Hillard: Trial Tr. of 1/28/02 at 135, 141-142, 154-56, 163, 168)

Hillard said that the CPD needs a police force that is trained on different cultures and religious practices, so they would know, for instance, that Arabs congregate at mosques at certain times of day, or Orthodox Jews observe Sabbath on Friday and Saturday, when they will not answer the telephone or a doorbell. (Trial Tr. of 1/28/02 at 141-142, 156, 163))

As to his personal experience with white supervisors, Martin testified that, in his early years, Lt. Harry Towns and Commander Duffy, both white, had mentored him, took a personal interest in him, and spent a lot of time helping him. (Trial Tr. of 1/29/02 at 59-60)

Lack of studies- Walker's 1996 survey

The City did not produce studies, from Professor Samuel Walker or anyone else, on the subject of whether black and Hispanic residents trust and cooperate with black and Hispanic sergeants more than with sergeants of other races and ethnicities. Walker took a survey, or poll, in 1996 on other subjects, five years after the sergeants' promotions at issue. (City's trial Ex. 31)

In response to Walker's poll question that asked whether respondents ever had contact with a supervisory officer in the Chicago police department, an overwhelming 81.3% said "no". Of the 18.5 that said "yes", that they had contact with a supervisory officer, most said that the supervisors were white, and most said they were satisfied with their treatment by those white supervisors. (City's trial Ex. 31, Appendix II to survey, question 12, 12C.1 & 12C.2)

In response to Walker's poll question that asked: "In what ways has the Chicago Police Department improved/gotten worse", about 2.2%, 33 out of 1500, mentioned "more minority police officers." (City's trial Ex. 31, Appendix II to survey, question 5A5)

Tom Potter's opinions

The City's witness, Thomas Potter, former Portland police chief, had no study. (City's trial ex. 29) Potter said he did not know anything about Chicago. (Trial tr. 1-28-02 at 91)

Potter disagreed with this City's categorization of its residents as black and Hispanic, and the catch-all "white" group. Potter identified 30 different groups, including persons

from Russia, Asia, Europe, and Native Americans. (Trial tr. 1-28-02 at 83-85)

Subsequent sergeant lists/continued use of race

On subsequent sergeant lists, the CITY continued to use race in the form of "merit" promotions, which were undertaken for racial balance, and which the Illinois Appellate Court held were "arbitrary", "unfair" and "without guidelines". (Trial Tr. of 1/29/02 at 71-72) McCardle v. Rodriguez, 277 Ill. App.3d 365, 659 N.E.2d 1356, 1359, 1362, 1364 (1992) (lieutenant promotions).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals should not have extended Grutter-Gratz, to allow the use of race for diversity for career promotions

Law

In Grutter-Gratz, this Court allowed the use of race for diversity for entrance into educational institutions. This Court pointed out that actual studies are needed, not simply opinions, Grutter v. Bollinger, 123 S. Ct. 2325, 2340 (2003) Gratz v. Bollinger, 123 S. Ct. 2411 (2003).

This Court has not addressed whether a court should defer to a public employers' pronouncements of a need for diversity for race-based promotions. In reference to public contracts, this Court has held that the "highly conclusionary statement of a proponent of the Plan" is not enough, and that "blind judicial deference to . . . executive pronouncements of

necessity has no place in equal protection analysis", City of Richmond v Croson, 468 U S 469, 109 S. Ct. 706, 724-725 (1989).

In conflict with the present opinion, another court rejected the argument that the need for effective law enforcement allows race-based sergeant promotions, stating:

> "The City's argument rests on the cynical assumption that members of a particular race will only cooperate with members of their own race .... the policy ...relies upon crude stereotypes about how members of the same race act around one another, and how they act around members of other races." Cotter v. City of Boston, 193 F. Supp. 2d 323, 340-343 (D.Mass. 2002), partly reversed on unrelated point, 323 F.3d 160 (1st Cir. 2003)

In Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 213-215 (4th Cir.1993), the court found that the opinion of a police chief, that effective law enforcement required racial diversity, was insufficient to create a compelling interest for race-based promotions.

In League of Martin v. City of Milwaukee, 588 F. Supp. 1004, 1019 (E.D.Wis.1984), the court rejected that city's argument that black officers relate better to the problems and needs of the black community, and should, therefore, be assigned to those areas, saying it was based on a racial stereotype.

In Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d 1547, 1564 (3rd Cir. 1996) (cert.granted, No. 96-679, case settled), the court found that diversity was not a compelling interest, to justify race-based layoffs of teachers,

where "the Board's policy, devoid of goals and standards, is governed entirely by the Board's whim."

The present case

Even if opinions and perceptions of public opinion were enough, the City's witnesses failed to support its claims.

The CPD Superintendent at the time, Leroy Martin, did not claim an operational need for racial preferences in the sergeant rank. (A-114a-122a) The City's witness, Professor Samuel Walker, conducted a survey, and found Chicago residents are satisfied with white supervisors. (statement of the case, pp.12) The district court stated that the Walker survey was "not evidence relied upon to support the operational need holding." (A-24a)

Neither Walker nor any other witness produced any study related to the Court of Appeals' misapprehension that "when police officers are routinely supervised by minorities, the fears that police department is hostile to the minority community will naturally abate." (A-9a)

The Court of Appeals wrote that "high-ranking CPD officials...testified that the presence of minority sergeants has not only improved police-community cooperation but also diffused potentially explosive situations, such as the tense racial situation following riots in the 1980s in Humboldt Park, a predominantly Hispanic community". (A-9a) This part of the opinion, as quoted, was taken verbatim from the City's brief, for which the City gave the following citation, which, in actuality, did not support the quotation: "(R. 334-2 at 126-30, 137-40)". (City's brief on appeal at 32) At that citation, there is nothing about explosive situations or riots in the 1980s in Humboldt Park.

Instead, at the aforegoing citation, Deputy Superintendant Joseph DeLopez said he thought he helped in one situation where Puerto Rican residents blocked a public way. On cross examination, DeLopez was asked how he would react, if an Asian resident indicated he did not want to deal with a Puerto Rican sergeant. DeLopez said that would be pre-judging a person and wrong. (Trial Tr. of 1/23/02 at 152) When the shoe is on the other foot, a city could offer speculation about public opinion as an excuse to refuse to promote black or Hispanic officers. This Court has held catering to personal prejudice is not a legitimate governmental interest, Palmore v. Sidoti, 466 U.S.429, 104 S. Ct. 1879, 1882 (1984); City of Cleburne Tex. v. Cleburne Living Center, 473 U.S. 450, 105 S. Ct. 3249, 3259 (1985).

Constitutional rights should not rise and fall upon public opinion or perceptions of public opinion.

There is no dispute that any police force needs to communicate and develop trust with citizens, however communication skills and trustworthiness are not a function of being black or being at least one quarter Hispanic.

Superintendent Martin dispelled the sterotype that Hispanic groups are in harmony with each other, acknowledging that there are divisions within the Hispanic group, and that Mexicans and Puerto Ricans "go at it with one another". (Trial Tr. of 1/29/02 at 52)

Blacks do not not necessarily bond with other blacks. In Chicago, to the contrary, black citizens have complained about black officers, and their propensity toward violence against black residents, Haugabrook v. City of Chicago, 545 F. Supp. 276 (1982).

Since the City has no policy to keep gang members from becoming police officers, Hispanic and black residents may feel more secure communicating with a white officer, to feel sure that the officer was not affiliated with a black or Hispanic gang. (Trial Tr. of 1/23/02 at 150)

People relate to each other on common ground, other than race. Petitioner Lenore Flaherty, a white female, told about a "domestic" call, where she and her black male partner came to the home of a black couple in an argument. The black woman rejected the overtures by Flaherty's black partner to talk to her, since he was a man. Flaherty, as a women, was able to talk to the black women and calm her down. (Trial Tr. of 1/29/02 at 78-80)

II.

Assuming the use of race for diversity can lawfully extend to career promotions, the Court of Appeals failed to hold the City to the narrow tailoring limits of Grutter-Gratz

In conflict with Grutter-Gratz, the Court of Appeals disregarded the limits for using race for diversity, as follows:

(1) mechanical quotas

The City imposed mechanical quotas so that being black or Hispanic were the sole determining factors, contrary to this Court's holding that mechanical quotas based on race or ethnicity cannot be imposed; race must not be the sole determining factor, Grutter, 123 S. Ct. at 2342-43, Gratz, 123 S. Ct. at 2428.

First, the City devised a surrepticious mechanical quota, by altering or "standardizing" the scores, to make the selection rates of blacks and Hispanics equal to 100% of the selection rate of "whites". The district court found the City did not limit the result to only an 80% selection rate to eliminate adverse impact, contrary to the Court of Appeals' misapprehension. (A-13a, 98a-104a)

Second, on top of the equalization of the selection rates, the City added 56 out of order promotions to fulfill an extra mechanical 10% quota for Hispanics, who already benefitted from the altered scores, and a mechanical 20% quota for females, which benefitted black and Hispanic females only, due to the score alterations. The combined effect of altered scores plus the out of order promotions cost some white females their promotions. (City's trial ex. 61, p.4) (A-14a) (Supp. Rec. pl. trial ex. 20-6) (statement of the case, pp. 7)

(2) no individualized consideration

The City did not give individualized consideration to applicants for sergeant, nor give any weight to diversity factors besides black race or Hispanic ethnicity, as required in Grutter 123 S. Ct. at 2344, Gratz at 2429.

The City did not determine which candidates had backgrounds in community relations, who had communication skills, education or knowledge of various cultures, religious practices, and ethnic groups in Chicago. The City did not determine which candidates could speak any of the languages used by immigrants groups in Chicago, such as Polish, Greek, Russian, Korean or Spanish. Officers with Hispanic last names do not necessarily understand any of the various Hispanic cultures or speak Spanish.

(3) No underrepresentation

The groups who benefitted from the preferences, mainly black and Hispanic males, were already fully represented in the sergeant rank, due to years of hiring and promotions quotas, as set out in the statement of the case, pp. 3-4, contrary to the limits set out in Grutter 123 S. Ct. at 2333-34.

No witness said that the City needed all 119 black and all 41 Hispanic sergeants that the City promoted, for diversity purposes. No witness said that the City would not have had enough blacks or Hispanics for diversity, if the sergeant list were used without altered scores, or without additional non-rank order promotions, or with one form of preference but not the other.

For blacks, the district court acknowledged that neither the Superintendant at the time, Leroy Martin, nor his legal advisor Gerald Cooper, specified shortages:

> "Neither Cooper nor Martin specified exactly how many more African-American sergeants were needed to serve this [operational] need . . . parity had essentially been achieved prior to the promotions at issue . . ." (A-83a)

The district court incorrectly credited Cooper and Martin with saying, at least, that "more African-American sergeants were needed to serve the CPD's operational needs." The Court cited Vol. VII of the trial transcript at 37, 182-86. (A-87a) Such testimony is not in the record. Nonetheless, saying that 'more were needed' would be too vague to justify all of the sergeants promoted due to black race.

For Hispanics, the district court incorrectly credited Martin as saying that "44 Hispanic sergeants was not adequate (for diversity purposes)" (A-86a) In actuality, Martin did not say that 44 Hispanics was "not adequate", and the court did not cite the record. The court added the words "for diversity purposes". Nonetheless, saying that a certain number was 'not adequate' would be too vague to justify all of the sergeants promoted due Hispanic ethnicity.

Without evidence, the district court said it was making an "inference" of a need, which it said was based on "uncontested" or "uncontroverted" facts, without pointing to any facts. (A-86a-89a)

(4) The use of race must be temporary

The use of race must be temporary and have a logical end point, Grutter, 123 S. Ct. at 2346.

Since the 1970s, the City used quotas for hire and for sergeant promotions, for black and Hispanic males, at rates well above their general population figures, even though the Court of Appeals found no evidence of intentional racial discrimination, U.S. v. City of Chicago, 549 F.2d at 435, as set out in the statement of the case, pp. 3-4.

There is no basis in the record for the panel's finding that "after 1991... no race conscious promotions were used". (A-14a) The district court had sustained objections to petitioners' questions about subsequent sergeant lists. (Trial Tr. of 1/16/02 at 136-38) Some evidence did come in, however, that the CITY used race on subsequent lists in the guise of so-called "merit" promotions, which, for example, delayed a white female petitioner's promotion for another 10 years. (Trial Tr. of 1/29/02 at 71-72) The Court of Appeals was

aware of the City's intent to use "merit" promotions for the 1993 sergeant test, Adams v. City of Chicago, 135 F.3d 1150, 1153, 1155 at III. (7th Cir. 1998). The "merit promotions were undertaken for racial balance, and the Illinois Appellate Court held they were "arbitrary", "unfair" and "without guidelines". McCardle v. Rodriguez, 277 Ill. App.3d 365, 659 N.E.2d 1356, 1359, 1362, 1364 (1992).

(5) Undue harm to innocent third parties

The use of race must not unduly harm innocent third parties, Grutter at 123 S. Ct. at 2345.

Here, the "white" group had already suffered from decades of quotas. The Court of Appeals affirmed that 82 petitioners were victims of the 1988-91 race-preferences at issue. (A-14a)

This use of race caused undue harm, in particular, to severely underrepresented groups, such as Asians, American Indians, and females classified as "white", as set out in the statement of the case, p. 4.

III.

Narrow tailoring, for diversity, was not met by mechanically altering or "standardizing" scores by race

Before the promotions at issue, the court had ended its approval of quotas and no court sanctioned the surreptitious "standardization" or alteration of scores by race as set out in the statement of the case, pp. 6-7.

The Court of Appeals wrongly stated that standardization to help one race and one ethnicity, is a "recognized statistical

method". (A-13a) Under Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 108 S. Ct. 2777 at 2787-2791 (1988), employers are not faced with a "Hobson's choice", to either impose surrepticious quotas to bring the pass rates of minorities up to 80% of the pass rate of whites, or face liability for adverse impact. Adverse impact is not illegal under Title VII, and employers cannot use adverse impact as an excuse to engage in racial preferences, Watson, 108 S. Ct. at 2788, Enseley Branch v. City of Birmingham Fire Fighters, 31 F.2d 1548, 1573, cert.denied, 115 S.Ct. 1695 (1995) (collecting cases).

In this case, the alteration of scores, on the ground of adverse impact, was not narrowly tailored to meet a need for diversity, where:

(1) the district court had given summary judgment to plaintiffs and against the City on the City's adverse impact defense, and the City had withdrawn its conditional cross appeal on its adverse impact defense (A-96a-104a),

(2) the district court found that the City promoted 42 blacks and Hispanics over the number needed to eliminate adverse impact, and no justification was offered for the extra 56 out of order promotions, made on top of score alterations,

(3) adverse impact has no logical relationship to an operational need for diversity,

(4) the minorities who participated in the job development were given disproportionate voting on the relative importance of tasks, to compensate for the fact they were fewer in number than than the "white" incumbents (R. 332), the City's only test consultant was a black psychologist, Curtis Banks (Trial Tr. of 1/22/02 at 208-209), so the Court of Appeals had

no basis to state that there was an "advantage" for "white" officers or that the test reflected their views (A-13a-14a), and

(5) the City documented the test's validity: it developed a job-related test, based upon representative tasks or behaviors important to the job, linked to KSA's (knowledge, skills and abilities). (R-328, Pre-trial order, sched. B, City's proposed facts #123,#124), and eliminated test items that did not pass a reliability quotient after the test. (Trial Tr. of 1/22/02 at 165, 175-179)

The Court of Appeals confusingly said that the test was not validated, which would not mean it was not valid. To make the test content valid means to make a test based upon representative tasks important to the job, as the City did, Billish v. City of Chicago, 989 F.2d 890 at 895 (7th Cir. en banc, 1993). Employers have made such showings, Gillespie v. State of Wis., 771 F.2d 1035, 1039 (7th Cir. 1985).

Under Watson v. Fort Worth Bank & Trust, 108 S. Ct. at 2787-2791, employers are not required to introduce formal validation studies. Here, the City voluntarily choose not to introduce whatever formal validation studies the Court of Appeals thought could have been introduced.

Contrary to the Court of Appeals' misapprehension, the City did not introduce into evidence a "federal court order not to promote officers on rank-order examinations unless it could document the test's validity as a rank order promotional device . . . to show that a higher score would result in better performance as a sergeant." (A-12a) Any such order would have been non-binding on petitioners, who were not parties to the case where the order were entered, Martin v. Wilks, 490 U.S. 755, 109 S. Ct. 2180 (1989).

The scores were not close, contrary to the Court of Appeals misapprehension, as set out in the statement of the case, p. 10. (A-14a).

Even if scores were close, courts have rejected the idea that close scores allows an employer to use race, Dallas Fire Fighters v. City of Dallas, 885 F. Supp 915, 922,n.13 (N.D.Texas 1995).

If scores had been close, then the City should have factored in criteria other than race to distinguish applicants. Former City Deputy Personnel Commissioner Robert Joyce stated that if race were not used, then the City would have brought in race-neutral factors, including disciplinary records, seniority, number of absences, productivity rates, awards and commendations. (Trial Tr. of 1-22-02 at 138-140)

IV.

Where the collective bargaining agreement barred the use of race and national origin in employment decisions, the City did not have the right to use race and national origin for diversity

The collective bargaining agreement, which the City made a Chicago ordinance and offered into evidence, states:

> ". . . employment-related decisions will be based on qualifications and predicted performance in a given position, without regard to race, national origin and sex..." (A-6a) (City's trial ex. 59, Art. 10)

The Court of Appeals found that the City can break its agreement because "the affirmative action promotions in this case do not violate the Equal Protection Clause". (A-7a) That

is not the law. An employer cannot have a compelling governmental interest that is in violation of its own contract with its employees. The contract prevails. Marshall v. Western Grain Co., 838 F.2d 1165, 1169, rehearing denied, 844 F.2d 794, cert.denied, 488 U.S. 852, 109 S.Ct. 137; Rose v. Bridgeport Brass Co., 487 F.2d 804 (7th Cir. 1973).

An employer has no obligation to engage in voluntary affirmative action. Szabo food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1081 (7th Cir. 1987)

Voluntary race preferences are unlawful, when they go against "state or local policies", Cotter v. City of Boston, 323 F.3d 160, 171-172 (1st Cir. 2003). In Cotter, the court found that race-based promotions passed strict scrutiny, in part, because state law only required an explanation for, but did not prohibit, race-based promotions, Id. 323 F.3d at 171. In this case, by contrast, the contract/ ordinance, prohibited the City from using race and national origin.

The contract was intended to deal with promotions, since another provision used the term promotion:

> "Seniority shall be considered in the promotion of officers covered by this Agreement." (City's trial ex. 59, p. 11655)

The rank of sergeant is the only promotion available to members of the bargaining unit. Nonetheless, the district court speculated that the above-quoted reference to promotions must refer to detective positions, citing dicta in cases where the position of detective was referred to as a promotion. (A-18a-19a, 93a) Contradicting the dicta, Superintendant Martin and Deputy Personnel Commissioner Joyce testified that the detective position is not a promotion,

but instead it is an appointment or assignment. (Trial Tr. of 1/29/02 at 55-56, 60) (R-357, Ex.D, p.1402, Vol.18 of 18 loose pleadings)

V.

The Court of Appeals wrongly dismissed 244 of the 326 petitioners based on standing to sue

The Court of Appeals upheld the dismissal of 244 of the 326 petitioners based on standing to sue, since they would not have been promoted even if the City had promoted in rank order without score alterations and extra quotas. (A-6a, 108a) (R-182) Nonetheless, these petitioners may be able to show they could contribute to diversity, by their individual backgrounds and knowledge.

The Court of Appeals relied upon Texas v. Legase, 528 U.S. 18, 120 S. Ct. 467 (1999), in direct conflict with another court's interpretation of Legase, in Cotter, 193 F. Supp. 2d at 332 -337. In Cotter, the court rejected that city's objection that white plaintiffs would not have made police sergeant even if race were not a factor, and found Legase did not apply, since it did not purport to deal with standing to sue, and instead dealt with liability on the merits. In Cotter, the court found that the plaintiffs only had to show that were ready and able to compete, and that a discriminatory policy prevented them from doing so on an equal basis. The court found: "To hold that Plaintiffs must show that they would have been promoted in the absence of racial considerations would collapse the standing inquiry in discrimination cases into a judgment on the merits of the case. . .", Id. 193 F Supp 2d at 324.

The denial of the right to compete on equal basis is enough to confer standing, Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 210, 115 S. Ct. 2097 (1993), Northeastern Florida Contractors v. Jacksonville, 508 U.S. 656, 113 S. Ct. 2297 (1993).

VI.

If this case is remanded for trial, then the jury should neither be instructed that petitioners have to prove negatives for the City's remaining two defenses, nor that a discriminatory effects interest is already established.

Before trial, the district court found issue preclusion, for the City's "discriminatory effects" defense, based upon findings in a different case, which dealt with assignments to detective, Majeske v. City of Chicago, 29 F. Supp. 872 (N.D. Ill. 1998), affirmed, 218 F.3d 816, 822 (7th Cir. 2000). (A-118a-125a, 129a) In Majeske, the jury found that the City had presented some evidence, based upon compound questions, of "unfavorable" treatment in hiring and assignments for blacks, and hostility toward blacks and Hispanics. In Majeske, the district court defined the term "hostility" to mean unfriendliness, not racial animus. (R-233, tr. Aug. 25, 1998, p. 136).

Neither unfavorable treatment nor unfriendliness are racial discrimination, Oncale v. Sundowner Offshore Services, Incorporated, 118 U.S. 998, 1002 (1998). Unfavorable treatment may result from poor performance. Whites also have been subjected to unfavorable treatment.

The plaintiffs in Majeske had not agreed to the jury questions in Majeske, and had not agreed to allow the court

to make additional findings, contrary to the district court's incorrect presumption in this case. (A-118a-119a)

The jury in Majeske had actually made findings contradictory to the judgment. The jury answered "no" to the question of whether unfavorable assignments or hostility excluded blacks or Hispanics from the opportunity for assignment to detective, Majeske, 218 F.3d 822. The court of appeals held that these jury responses were inconsistent with the judgment, Majeske, 218 F.3d 822-823. For issue preclusion to apply, a finding must be essential to the judgment, La Preferida, Inc. V. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900, 905-06 (7th Cir. 1990).

In Tice v. American Airlines, Inc., 162 F.3d 966, 971-973 (7th Cir. 1998), the Court of Appeals found that issue preclusion, as distinct from claim preclusion, can only hold between the same parties, Id. 162 F.3d at 974. Only two Majeske plaintiffs were on the list of 82 plaintiffs in the present case, after the district court dismissed the remaining plaintiffs based on standing. (A-108a-112a)

Nevertheless, the district court found that all of the present plaintiffs were in privity with the Majeske plaintiffs due to representation by the same attorney and "prior history of consolidated discovery." (A-124a)

In Tice, 162 F.3d 973, the Court of Appeals reversed a finding of privity, finding that representation by the same attorney was not a factor. (See also Hardy-Johns -Manville Sales Corp., 681 F.2d 334, 340 (5th Cir., 1982).

The district court cited no law that holds that "consolidated discovery" leads to a finding of privity.

In this case, based upon its wrongful finding of issue preclusion, the district court instructed the jury that the plaintiffs were precluded from disputing past discrimination. The district court mischaracterized unfavorable treatment as "discrimination" in the jury instructions. Further, the court wrongly instructed the jury that plaintiffs had to prove the negative for all three of the City's alleged defenses. (A-56a-60a), (Trial Tr. 1-29-02 at 125-127, 147-150, 163) (R.330)

It is impossible to prove a negative. Nevertheless, some jurors decided that plaintiffs had proved negatives, and reached a unanimous finding on only one special interrogatory, finding that plaintiffs did not prove the negative of the existence of a Discriminatory Effects Interest as to Hispanics. The plaintiffs' failure to prove the negative does not mean that the proposition was established, nonetheless, the district court wrongly gave the following direction for any retrial:

> ". . . at any retrial, the jury would have to be instructed that a Discriminatory Effects Interest as to Hispanics is already established." (A-105a)

The district court cited no legal basis to enter the above direction for a possible future trial, following a mistrial. Although waiver would not apply, at the time for judgments as of a matter of law, plaintiffs had urged that the district court should not have instructed the jury to find negatives, contrary to the district court's finding. (A-20a) (Trial Tr. 1-29-02 at 125-127, 147-150, 163)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 02-4151 & 02-4241

[Filed January 22, 2004]

ROBERT PETIT et al.,	)
Plaintiffs-Appellants, Cross-Appellees,	)
	)
v.	)
	)
CITY OF CHICAGO, a municipal corporation, et al.,	)
Defendants-Appellees, Cross-Appellants.	)
	)

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 90 C 4984 & 91 C 668
William T. Hart, Judge

Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

On December 29, 2003, the plaintiffs-appellants filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and no judge in active service has requested a vote on the petition for rehearing en banc.[1] The petitions for rehearing and rehearing en banc are therefore DENIED.

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[1] Chief Circuit Judge Joel M. Flaum and Circuit Judges Ilana Diamond Rovner and Ann Claire Williams took no part in the consideration of the suggestion for rehearing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 02-4151 & 02-4241

[Decided December 15, 2003]

ROBERT PETIT et al.,
Plaintiffs-Appellants, Cross-Appellee,

v.

CITY OF CHICAGO, a municipal corporation, et al.,
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 90 C 4984 & 91 C 668
William T. Hart, Judge

Before BAUER, MANION, and EVANS, Circuit Judges

OPINION

EVANS, *Circuit Judge*. Eighteen years ago, the Chicago Police Department (CPD) conducted an examination that for a fairly brief moment in time formed the basis for promotions of patrol officers to the rank of sergeant. After the examination the raw scores were standardized, most relevantly here for race and ethnicity. What followed was this lawsuit alleging that promotions resulting from the exam violated the plaintiffs' rights under the Equal Protection Clause of the United States Constitution. Today, odd as it may seem, we must evaluate the hoary examination based on the standards set out just this year by the United States Supreme Court in two affirmative action cases involving student admissions at the University of Michigan.

This lawsuit itself stirred to life in 1988 when some of the plaintiffs tried to intervene in another case--*United States v. City of Chicago* (C.A. 73 C 2080, N.D. Ill.). When their attempt was rejected, they filed this case in 1990. The original plaintiffs were 326 nonminority Chicago police officers who took the 1985-88 promotional examination for the rank of sergeant. They alleged that the affirmative action plan implemented in connection with that examination deprived them of the equal protection of the law. The City defended the promotions based on the plan on the grounds that (1) they were necessary to maintain the operational effectiveness of the CPD; (2) they were necessary to remedy past discrimination in hiring and promotions; and (3) they were necessary to avoid a claim that the City's past policies were a violation of Title VII under an "adverse impact" theory.

The case was consolidated for discovery with five other cases challenging various CPD promotions. Along the way,

all plaintiffs except 82 have been dismissed for lack of standing. In addition, the doctrine of collateral estoppel has been applied to preclude plaintiffs from relitigating certain issues decided in *Majeske v. City of Chicago*, 218 F.3d 816 (7th Cir. 2000). Those issues were that, during the decades prior to 1989, the City subjected African-American police officers to unfavorable treatment in assignments, subjected both African-American and Hispanic officers to unfavorable treatment in hiring and to hostile treatment, and that the CPD tolerated the hostile treatment. Ultimately the case went to trial on issues of liability. The jury was asked to make findings on 95 special interrogatories. It answered five. The jurors found that each of the five times the City made promotions using the 1985-88 exam results, it had a compelling interest in remedying the effects of past discrimination against Hispanics. In February 2002, because the jury did not reach a complete verdict, a mistrial was declared.

The parties then filed motions pursuant to Rule 50 of the Federal Rules of Civil Procedure. Because not all issues could be resolved through a decision on the Rule 50 motions, and because the City claimed that the plaintiffs had not preserved certain issues raised in their Rule 50 motion, the district judge considered the motions as "summary judgment motions to the extent they raise issues not properly preserved for a Rule 50 motion or rely on evidence not presented at trial." In other words, the entire record was before the district judge when he granted summary judgment for the City based on its claim that the police department had an operational need to engage in affirmative action and that the action it took was narrowly tailored to meet that need. Neither party has raised serious objections to this rather unusual procedure, and our independent evaluation reveals that the record contains undisputed facts which allow a final disposition of this claim.

In this appeal the plaintiffs raise several issues, but only a few require discussion.

One issue we may quickly dispatch is whether a large number of plaintiffs were properly dismissed. The first time dismissal of these plaintiffs was requested, the request was denied, but upon reconsideration, after *Texas v. Lesage*, 528 U.S. 18, 120 S. Ct. 467, 145 L. Ed. 2d 347 (1999), dismissal was ordered of all but 82 plaintiffs.[1] In *Lesage,* the Court held that dismissal of equal protection claims brought by rejected applicants to a state university doctoral program was proper because it was undisputed that the applicants would have been rejected regardless of any alleged discrimination. In that situation there is "no cognizable injury warranting relief. . . ." At 21. Similarly, the dismissed plaintiffs in this case would not have been promoted regardless of any standardization of test results and so have no cognizable injury. We find that the dismissal was proper.

The plaintiffs also argue that the collective bargaining agreement (CBA) between the City and the Fraternal Order of Police prohibits the affirmative action plan involved in this case. The CBA says:

> Employment related decisions will be based on qualifications and predicted performance in a given position, without regard to race . . . sex . . . or national origin . . . .

This issue was raised for the first time at the close of evidence at trial on a motion for directed verdict--that is, about 12 years into the case. The district judge found that the

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[1] This is not a class action. All plaintiffs are named.

issue had not been properly preserved for purposes of the Rule 50 motion, but because of the mistrial he allowed the parties to raise issues–not otherwise waived or dismissed in pretrial proceedings–in summary judgment motions or Rule 50 motions converted to summary judgment motions.

We will set aside consideration whether the controversy must first be arbitrated as required by the CBA or whether the contract excludes promotions to sergeant on the basis that those positions are outside the bargaining unit because there is a more compelling reason why the arguments fail. As we shall soon see, the affirmative action promotions in this case do not violate the Equal Protection Clause.

We turn, then, to the dispositive issue: the City's defense that the procedures used met an operational need of the police department. Like any racial preference, this one must be justified by a compelling state interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). In *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), one of the University of Michigan cases we alluded to at the beginning of this opinion, the Court endorsed the view that "student body diversity is a compelling state interest that can justify the use of race in university admissions." At 2337. In arriving at that conclusion, the Court deferred to the law school's educational judgment that "such diversity is essential to its educational mission . . . ." The goal of the law school was to assemble a class that was "exceptionally academically qualified and broadly diverse," and as part of that goal it sought to enroll a "critical mass" of minority students. At 2339. The Court found that the benefits of diversity were substantial, for which proposition it relied in part on the views of high-ranking retired officers and civilian leaders of the United States military to the effect that a "highly qualified, racially diverse

officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." At 2340. Furthermore, in the Court's words, the "effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." At 2340-41. The conclusion was that the "Law School has a compelling interest in attaining a diverse student body." At 2339.

It seems to us that there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago. Under the *Grutter* standards, we hold, the City of Chicago has set out a compelling operational need for a diverse police department.

In *Grutter*, the Court noted that its holding was in "keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." At 2339. Similarly, we believe that it is proper in this case to rely on the views of experts and Chicago police executives that affirmative action was warranted to enhance the operations of the CPD. In fact, prior to *Grutter* we stated that we "left open a small window for forms of discrimination that are supported by compelling public safety concerns, such as affirmative action in the staffing of police departments . . . ." *Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002).

In this case, the City presented a strong basis to conclude that some rather modest affirmative action promotions were necessary for the effective operation of the police department. Professor Samuel Walker, an expert in criminal justice and police-community relations, testified that all major studies conducted since the 1960's recognized the importance of

minority representation. The reality of urban policing is that minorities are frequently mistrustful of police and are more willing than nonminorities to believe that the police engage in misconduct. Walker also described the results of a survey he conducted to measure the perceptions and attitudes of Chicago residents about minority supervisors. He found that among Chicagoans, nonminorities have more favorable opinions about the CPD than do minorities. Distrust and a lack of confidence in the police, in turn, reduce the willingness of some community members to cooperate with the police. On the other hand, when police officers are routinely supervised by minorities, the fears that the police department is hostile to the minority community will naturally abate. Walker's conclusion was that an increase in minorities enhanced the public's perception of the CPD, which in turn enhanced the department's ability to prevent and solve crime.

A former chief of the Portland (Oregon) Police Bureau, Tom Potter, testified to the necessity of diversity among police supervisors, both for the community's perceptions of police departments, but also internally in changing the attitudes of officers. Additionally, a number of high-ranking CPD officials confirmed the need for diversity at the sergeant rank and that sergeants are in a unique position to influence officers on the street. These officials testified that the presence of minority sergeants has not only improved police-community cooperation, but also diffused potentially explosive situations, such as the tense racial situation following riots in the 1980's in a predominately Hispanic community. These officials also recounted the growth in the minority population of the City and the fact that minority representation at the sergeant rank had not kept pace with that growth.

We have previously recognized that a visible presence of minorities in supervisory positions is critical to effective policing in a racially diverse city like Chicago because supervisors "set the tone for the department." Equally important, the presence of minority supervisors is an important means of earning the community's trust: "Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of the community and they are more likely to have it if they have 'ambassadors' to the community of the same [race or]ethnicity." *Reynolds*, 296 F.3d at 529. In another case involving promotions to sergeant, we found that "the composition and operation of an effective police force should be in as complete harmony as possible with the community from which it springs." *United States v. City of Chicago*, 663 F.2d 1354, 1364 (7th Cir. 1981) (en banc).

All in all, we find that, as did the University of Michigan, the Chicago Police Department had a compelling interest in diversity. Specifically, the CPD had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.

This does not end our inquiry, however, for "[e]ven in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" *Grutter*, 123 S. Ct. at 2341, quoting *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996). It is here that *Grutter* and the other University of Michigan case–*Gratz v. Bollinger*, 539 U.S.

244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)–diverge. The system for undergraduate admissions at issue in *Gratz* was rejected because it was not narrowly tailored and, for that reason, violated the Equal Protection Clause. The method used by the university was automatically to assign 20 points–or one-fifth of the 100 points need to guarantee admission–to each underrepresented minority applicant solely because of race. The system, which made race the deciding factor for every minimally qualified minority applicant, was found not to be narrowly tailored. On the other hand, the system at the Michigan Law School as described in *Grutter* was constitutional. Rejecting "mechanical, predetermined diversity 'bonuses,' "the Court emphasized that race must be used in "a flexible, nonmechanical way." A race-conscious admissions program cannot use a quota system. It cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 123 S. Ct. at 2343. However, race can be a "'plus' factor in the context of individualized consideration of each and every applicant." *Id.* at 2342. In addition, a program must not unduly harm members of any racial group and must "work the least harm possible to other innocent persons competing for the benefit." *Id.* at 2345, quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 308, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986). Finally, the program must be limited in time; that is, not enshrined as a permanent justification for racial preferences.

In the mid-1980's, when the CPD determined that it would make approximately 500 promotions of patrol officers to the rank of sergeant, it formulated an examination procedure, which any patrol officer was eligible to take and anyone who sought a promotion had to take. The promotions were to be made according to rank order of the scores. A total of 3,416 officers took the examination– 2,274 white officers

(and in a somewhat bizarre move, Asians, American Indians, and other smaller ethnic groups were thrown into the white category); 931 African-Americans; and 192 persons classified as Hispanic.

The examination consisted of four parts, with the following weights: a written multiple choice test administered in 1985 (28%); a written short answer test administered in 1988 (29%); an oral examination also administered in 1988(40%); and performance evaluations (3%). The points added up to a total possible score of 100.

As recounted by Robert T. Joyce of the City of Chicago Department of Personnel, the results were evaluated by employees of his department. For the subjective parts of the test--the written short answers and the oral examination, the City standardized the scores to eliminate differences resulting from the differences in grading among the different persons doing the grading. The results, after this standardization, showed that the test had an adverse impact on African-Americans and Hispanics and would have resulted in far too few promotions to persons in those categories. As we noted, there were 458 officers promoted. Using these test results, only 60 would have been African-American and only 15 would have been Hispanic.

At the time the examination was being formulated, the City had experience with two prior examinations for the rank of sergeant and, more importantly, was under a federal court order not to promote officers on rank-order examinations unless it could document the test's validity as a rank order promotional device. In other words, to use the results as they stood, the City would have had to show that a higher score would result in better performance as a sergeant. But this test was not validated, and, in fact, the City explains that it would

be extremely difficult to validate such a test. Furthermore, analysis showed that there was a standard measure of error for the examination that was greater than three points. That meant that a person taking the test on two different days could be expected to receive a score on one day that was within plus or minus three points of the score on another day. In addition, on the 100-point scale that was used to grade the examination, the scores of a large number of candidates were too close to be distinguished from one another. Finally, in examining the process of developing the test, the City found that white and African-American sergeants differed as to the relative importance of various sergeant duties. Seventy percent of the sergeants who participated in the job analysis were white, so that the test was created from data that tended to reflect the views of the white sergeants.

For those reasons, through a rather complicated procedure, the City standardized the scores based on race. As Mr. Joyce explains it, standardization is a recognized statistical method of removing differences between the scores of two or more groups of test-takers. If, for instance, two different groups have different mean scores, and there is no objective reason to assume the two groups should have scored differently, standardization is an acceptable method of equalizing the scores. The process was an attempt to produce results that reflected the score a candidate would have received if the test had not had an adverse racial impact. The standardized scores were then used to place the candidates in rank order.

Given the margin of error and the fact that the test was not validated, these candidates, both before and after standardization, were fairly uniformly qualified for promotion. In fact, according to the examination results, it would appear that all of the candidates who were promoted,

and many who were not promoted were qualified for promotion. The passing score on the examination was 70, and approximately 2000 of the candidates passed. The result of the standardization was that, of the top 500 officers, 332 were white, 138 were African-American, and 30 were Hispanic. The score of the 332nd white candidate in the pool of 500 eligible candidates was 82.98; the unstandardized score of the 138th African-American candidate was 80.70 and the standardized score was 82.82; the unstandardized score of the 30th Hispanic candidate was 80.95 and the standardized score was 83.43. The differences are within the margin of error. Based on the examination results, the City made standardized rank-order promotions of 402 candidates–298 were white; 119 were African-American; and 41 were Hispanic. In addition, 56 out-of-rank-order promotions were made. It cannot be said that the process affected every "minimally qualified" candidate as did the blanket award of 20 points per candidate, the procedure found to be unconstitutional in *Gratz*. In fact, standardizing the scores can be seen not as an arbitrary advantage given to the minority officers, but rather as eliminating an advantage the white officers had on the test.

The ultimate result was that of the 82 plaintiffs to this action, some had their promotions delayed and approximately 50 were not promoted. While we do not minimize the loss that those who were not promoted suffered, we find that the procedures met the *Grutter* standard for minimizing harm to members of any racial group.

Furthermore, the results of this examination were not used after 1991, and no race-conscious promotions have been made since that time. We are told that, in fact, new examinations have been held in 1993, 1998, and 2002. The affirmative action plan at issue in this case was limited in time, as *Grutter* also requires.

Faced with a very difficult situation, we find that the City formulated a plan in the 1980's which meets the standards enunciated in 2003. The judgment of the district court is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 4984

[Filed November 14, 2002]

ROBERT PETIT, et al.,	)
Plaintiffs,	)
	)
	)
v.	)
	)
CITY OF CHICAGO,	)
a municipal corporation,	)
Defendant.	)
	)

William T. Hart, UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER

Following a mistrial, the remaining parties in this action filed Rule 50(b) motions for judgment as a matter of law and also moved for summary judgment. The Rule 50(b) motions were denied and defendant's motion for summary judgment was granted. *See Petit v. City of Chicago*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589

(N.D. Ill. Oct. 24, 2002) ("*Petit XI*").[1] On October 24, 2002, a final judgment was entered in favor of all defendants. *See* Docket Entry [365].

Rule 59(e)'s ten-day time period for filing a motion to alter or amend expired on November 7, 2002. On November 4, 2002, plaintiffs timely filed a motion to alter and set aside judgment [368] which they presented on November 6, 2002. On the same dates, plaintiffs also filed and presented a motion to extend the time to file an amended motion to alter and set aside judgment [367]. The motion for extension of time was denied, *see* Minute Order dated November 6, 2002 [369], because this court lacks authority to extend the time period for filing a Rule 59(e) motion. Fed. R. Civ. P. 6(b); *Talano v. Northwestern Medical Faculty Foundation, Inc.*, 273 F.3d 757, 761 (7th Cir. 2001). Later on November 6, 2002, plaintiffs filed their amended motion to alter and set aside judgment [366] ("Pl. Am. Motion to Alter"). Because the amended motion was filed within the time for bringing a Rule 59(e) motion, it will be considered. Additionally, because the amended motion includes all the contentions contained in the initial motion, only the amended motion will be discussed and the initial motion to alter and set aside judgment will be denied without prejudice.

This lawsuit has been pending for more than 12 years. The parties have had substantial opportunity for discovery and the briefing of issues. *See Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *5; *Petit v. City of Chicago*, 2001 U.S. Dist. LEXIS 15372, 2001

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[1] Throughout today's ruling, familiarity with *Petit XI* is presumed. Terms and abbreviations used in that opinion will also be used in today's opinion.

WL 1143163 *1 (N.D. Ill. Sept. 27, 2001) ("*Petit VII*"). The parties were also provided with substantial opportunity and time to brief the Rule 50(b) and summary judgment motions. *See* Docket Entries [335]-[363]. A Rule 59(e) motion is not the appropriate mechanism for presenting new issues or facts that could have been raised during the pendency of the original proceeding, but were not. *Bordelon v. Chicago School Reform Board of Trustees*, 233 F.3d 524, 529 (7th Cir. 2000); *Divane v. Krull Electric Co.*, 194 F.3d 845, 850 (7th Cir. 1999); *United States v. 47 West 644 Route 38, Maple Park, Ill.*, 190 F.3d 781, 783 (7th Cir. 1999), *cert. denied*, 529 U.S. 1005, 120 S. Ct. 1270, 146 L. Ed. 2d 220 (2000); *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996); *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1269-70 (7th Cir. 1996); *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985)(quoting *Keene Corp. v. International Fidelity Insurance Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1983), *aff'd*, 736 F.2d 388 (7th Cir. 1984)).

In the present motion, plaintiffs first dispute the holding that the CBA's non-discrimination provision does not apply to promotions to sergeant. *See Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *27-29 (§ III(c)(1)). Plaintiffs again rely on CBA § 23.3's provision that "Seniority shall be considered in the promotion of officers covered by this Agreement" as showing all provisions of the CBA apply to all promotions. Plaintiffs contend the court mistakenly assumed that provision could be referring to promotions to detective. *See Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *28. Plaintiffs point to Robert Joyce's testimony at the Majeske

trial,[2] which they contend shows that detective is an assignment, not a promotion. The testimony, though, is that a detective is a "police officer assigned as a detective" and that it is an "appointive position," not a "permanent career service appointment" as with a sergeant. Joyce did not testify that a detective appointment, unlike a sergeant appointment, is not a promotion. To the contrary, opinions in both the Majeske case and consolidated discovery proceedings repeatedly refer to detective as a promotion. *See, e.g., Majeske v. City of Chicago*, 218 F.3d 816, 818 (7th Cir. 2000), *cert. denied*, 531 U.S. 1079, 121 S. Ct. 779, 148 L. Ed. 2d 676 (2001); *Majeske v. Fraternal Order of Police, Local Lodge No. 7*, 94 F.3d 307, 308 (7th Cir. 1996); *Majeske v. City of Chicago*, 29 F. Supp. 2d 872, 873 (N.D. Ill. 1998); *Majeske v. City of Chicago*, 1998 U.S. Dist. LEXIS 8644, 1998 WL 312016 *1 (N.D. Ill. June 4, 1998); *In re Chicago Police Officer Promotions*, 1995 U.S. Dist. I EXIS 2611, 1995 WL 103296 *1 (N.D. Ill. March 2, 1995); *In re Chicago Police Officer Promotions*, 1993 U.S. Dist. LEXIS 11710, 1993 WL 322834 *1 (N.D. Ill. Aug. 23, 1993). The Illinois Appellate Court has referred to the Chicago detective position as a promotion covered by the collective bargaining agreement in effect in 1995. *See McArdle v. Rodriguez*, 277 Ill. App. 3d 365, 659 N.E.2d 1356, 1360, 213 Ill. Dec. 709 (1st Dist. 1995)("Unlike lieutenants, detectives were not members of the career service, and merit promotions for detectives were specifically authorized by a Police Department general order and the detectives' collective bargaining agreement between the City and the police union."). The Arbitration Decision ([351] Exh.

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[2] Majeske, Aug. 3, 1998 Tr. at 1402 (provided as Exh. D to Pl. Memo. in Reply to the City's Response to Pl.'s Motion for Judgment as a Matter of Law [356]).

1, at 6), also refers to detective as a promotion. Plaintiffs do not point to evidence or law adequately raising an issue that appointment as a detective is not a promotion.

But even if the detective position is not a promotion, there is no evidence that there are not other possible promotions to which § 23.3 is referring. Moreover, there is still no express language in the CBA providing that the CBA in general or the non-discrimination provision in particular applies to promotions to the non-bargaining unit position of sergeant. For the reasons stated in *Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *28, the lack of an express provision requires that the non-discrimination provision of the CBA be construed as not applying to sergeant promotions. The holding contained in § III(c)(1) of *Petit XI* will not be modified.[3]

Plaintiffs object to the alternative holding in *Petit XI* that, in the event of any retrial, it would stand as established that a Discriminatory Effects Interest exists as to the promotion of Hispanics. 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614 at *13, 19, 29, 33. Plaintiffs, however, do not make any argument against the holding that they failed to adequately preserve any Rule 50 challenge to that jury determination. 239 F. Supp 2d 761, 2002 U.S. Dist. LEXIS 20614 at *5-6 (§ II(B)(1)), 13. The alternative holding will stand.

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[3] Even if it were held that the non-discrimination provision applies to sergeant promotions, it would still have to be considered whether a breach of that provision "would otherwise preclude the possibility of an overriding compelling interest." *Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *29.

Plaintiffs contend that, in rejecting their summary judgment motion as to the Discriminatory Effects Interest, *see* 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, at *29-30, an incorrect burden of proof was applied. The prior holdings as to the applicable burden of proofs and their application in a jury trial will not be modified. 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, at *5 & n.11, 11-12; *Petit v. City of Chicago*, 219 F. Supp. 2d 917 (N.D. Ill. 2002) ("*Petit X*"). The expert testimony of Bernard Siskin was the principal evidentiary basis for holding that a factual dispute exists as to the Discriminatory Effects Interest. Plaintiffs object to the consideration of that testimony. Plaintiffs' objections to permitting Siskin to be substituted for defendant's previously retained expert were previously denied and plaintiffs were provided with Siskin's report years before the trial was held and were provided with more than adequate opportunity to retain their own expert and/or analyze Siskin's opinions. *See Petit v. City of Chicago*, 1999 U.S. Dist. LEXIS 1362, 1999 WL 66539 *1-2 (N.D. Ill. Feb. 8, 1999) ("*Petit III*"); *Petit v. City of Chicago*, 2002 U.S. Dist. LEXIS 38, 2002 WL 10481 *6 (N.D. Ill. Jan. 3, 2002) ("*Petit IX*"). *See also Petit v. City of Chicago*, 2001 U.S. Dist. LEXIS 24757, 2001 WL 629306 *9-11 (N.D. Ill. May 25, 2001) ("*Petit V*"). Plaintiffs' present contention that they had inadequate opportunity for the discovery necessary to contest Siskin's testimony is without any merit.

Summary judgment in the City's favor was based on its Operational Need Interest. *See Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *20-27 (§ III(B)(3)). As to the promotion of Hispanics, it was based on both internal and external operational needs. 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614 at *25-26. As to the promotion of African-Americans, summary judgment was based on external operational needs, there being a genuine

factual dispute as to the promotions being narrowly tailored to internal operational needs for more African-American sergeants. 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS at 20614, *26-27. Plaintiffs raise various objections to the Operational Need Interest holdings.

First, plaintiffs contend defendant did not move for summary judgment based on this ground. To the contrary, defendant did move for summary judgment based on all three of the asserted compelling interests. *See Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *8 (citing Def. Response to Pl. Motion for Judgment as a Matter of Law [350] at 1-2 & n.2).

Next, plaintiffs rely on deposition testimony of LeRoy Martin,[4] Pl. Am. Motion to Alter [366], Exh. E at 63-64, that they contend states he did not believe additional Hispanics and African-Americans were needed to serve the CPD's operational needs. Since this evidence was not provided or relied upon in response to defendant's summary judgment motion, it is inappropriately relied upon to support the Rule 59(e) motion. Moreover, plaintiffs had the opportunity to cross examine Martin at trial, but did not attempt to use this deposition testimony to impeach his trial testimony. Further, even if the deposition testimony were to be considered, it does not support plaintiffs' present contention. It is unclear what Martin stated before and after the limited deposition excerpt provided by plaintiffs. As to what is provided, Martin said the greatest need for more African-Americans was among detectives, but he did not state that this was the only part of the force that needed more African-Americans, just the

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[4] Martin was the CPD's Police Superintendent during the time of the promotions at issue.

division where they were "mainly" needed. There is no deposition testimony that there was no need for additional African-American or Hispanic sergeants.

Plaintiffs dispute *Petit XI's* factual statements as to the existence of an internal operational need. Plaintiffs' present argument mainly goes to the internal operational need for more African-American sergeants. That, however, was not a basis for granting summary judgment in favor of defendant. In any event, *Petit XI* adequately states the basis for holding there were no genuine factual disputes as to the existence of internal operational needs, including narrow tailoring in regard to the promotion of Hispanics.

As to external operational needs, plaintiffs contend that Martin's testimony is misdescribed. *See Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *65 (citing Martin testimony, Tr. Vol. VIII 37). Contrary to plaintiffs' contention, Martin's testimony refers to all the sergeant promotions that occurred in 1988, 1990, and 1991, *see* Def. Exh. 40, not just the Out-of-Rank Promotions of Hispanics and women.

> Q [defendant's counsel]. Now, at the time you, as Superintendent of Police, made the promotions listed there [Def. Exh. 40] to sergeant in 1988, 1990 and 1991, did you believe it was necessary to make those promotions off the 1988 list and make the out-of-rank promotions to Hispanics and women to remedy past discrimination and to meet the department's operational needs?
>
> A. [Martin] Yes.

Tr. Vol. VIII 37 (emphasis added).

Also, plaintiffs now question the reliability of Cooper's testimony as to the need for African-American sergeants because, during the promotion period at issue, he was in a legal department desk job, not assigned to the field. At most, that contention goes to the weight of Cooper's testimony. As stated in *Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *26, though, there was no evidence counter to Cooper's and Martin's testimony and plaintiffs still do not point to any such evidence. A reasonable finder of fact could only find that there existed a need for additional African-American sergeants to serve the CPD's external operational needs.

Plaintiffs' present contentions as to the Walker survey do not matter since the survey was not essential evidence and the discussion of contact with commanders concerns a point raised by plaintiffs, not evidence relied upon to support the operational need holding. 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614 at *25.

Plaintiffs contend that testimony about a need for minorities to serve in community policing programs is misplaced because the CPD did not begin community policing until 1995, after the promotions at issue in this case. In response to defendant's summary judgment motion, though, plaintiffs did not contend that expert witness Tom Potter's testimony regarding the use of community policing in Chicago was inaccurate. 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614 at *24.[5] The actual testimony is that the CAPS

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[5] *Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *23, misdescribes Potter's testimony in stating: "He testified that building such trust is particularly important for community policing strategies, which the CPD began

community policing program started in late 1994 and went citywide in 1995. Tr. Vol. VII 161. Even if reliance on this testimony is not waived for having failed to cite it in response to defendant's motion for summary judgment, it would not affect the outcome. Although community policing was cited as involving greater community interaction on the part of sergeants, testimony also supported that there is substantial interaction between sergeants and the community even without community policing and that having minority sergeants improves a police department's performance in such interaction. *See Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *22-24. Again, there is no contrary evidence supporting a genuine factual dispute on this issue. The date community policing began would not change the holding regarding external operational need.

Plaintiffs' contentions that certain evidence should not be considered because not adequately disclosed in discovery have all either already been rejected or have been waived for failure to adequately object at the time the evidence was presented at trial.

Plaintiffs dispute the statement in *Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *27, that "the effect on many or most of the remaining plaintiffs was a delayed promotion to sergeant, not a complete exclusion from that position, nor any loss of an existing

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implementing in the mid-1980's." Potter actually testified that community policing was being talked about in police periodicals and journals in the mid-1980's and that, in the late 1980's or early 1990's, the CPD invited him to speak to senior staff about such programs. Tr. Vol. VII 68.

position." They point to the fact that 31 of 81 plaintiffs were promoted to sergeant based on the Examination. Thirty-one is still "many" of the plaintiffs being promoted. Moreover, 31 represents those who were promoted by 1991. An additional number of plaintiffs were promoted to sergeant based on subsequent promotional examinations.

Plaintiffs point to one of defendant's proposed facts contained in the final pretrial order. That proposed fact states in part: "The remaining 33 out-of-rank promotions to females are not at issue in this litigation." Final Pretrial Order, Sched. B, Def. Stmt. P 167. That statement is correct, the gender discrimination claims contained in the complaint were no longer pending at the time the case went to trial; § 1983 claims of race and national origin discrimination were the only pending claims. *See Petit XI*, 239 F. Supp. 2d 761, 2002 U.S. Dist. LEXIS 20614, 2002 WL 31409589 at *1 n.6; *Petit IX*, 2002 U.S. Dist. LEXIS 38, 2002 WL 10481 at *9. It is unclear how plaintiffs jump from the fact that 33 women received out-of-rank order promotions to the conclusion that 33 additional women are now entitled to be promoted based on operational need. They may be contending that 33 women should have been promoted based on operational need and that the 33 chosen should have been those women who scored the highest on the Examination without adjustments for racial standardization. Whatever the basis is for the logical leap, the contention is without merit for a number of reasons. One, gender claims were no longer pending by the time this case went to trial. Two, the City would not have been obliged to use the unstandardized Examination in determining which women to promote to satisfy its operational needs. Three, plaintiffs did not previously contend that operational need justified the promotion of women and continue to contend that race and gender cannot be an operational need. Four, even if operational need would justify more promotions of women,

a municipality is not obliged to engage in affirmative action just because a compelling interest exists; narrowly tailored affirmative action is permitted by a compelling interest, not required by it. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir.), *cert. denied*, 522 U.S. 963, 118 S. Ct. 397, 139 L. Ed. 2d 310 (1997); *L. Tarango Trucking v. County of Contra Costa*, 181 F. Supp. 2d 1017, 1037 (N.D. Cal. 2001).

As to issues raised in the Rule 59(e) motion that are not expressly addressed herein, the analysis contained in *Petit XI* speaks for itself.

IT IS THEREFORE ORDERED that plaintiffs' motion to alter and set aside judgment [368] is denied without prejudice. Plaintiffs' amended motion to alter and set aside judgment [366] is denied.

ENTER:

/s/_____
William T. Hart
UNITED STATES DISTRICT JUDGE

DATED: NOVEMBER 14, 2002

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No 90 C 4984

[Filed October 23, 2002]

ROBERT PETIT, et al.,
Plaintiffs,

v.

CITY OF CHICAGO, a municipal corporation,
Defendant.

MEMORANDUM OPINION AND ORDER

I. PROCEDURAL BACKGROUND

This lawsuit involves promotions within the Chicago Police Department ("CPD") and plaintiffs' allegations that White police officers were discriminated against during the process. The promotions at issue were based on a sergeant promotional examination administered from 1985 to 1988 (the

"Examination").[1] Scoring of the Examination was adjusted based on race[2] so that each racial group would be represented in the top 500 candidates expected to be hired in approximately the same percentage as they were in the entire candidate pool (the "Score Adjustments"). Also, some Hispanics were promoted outside the rank order of the adjusted scores on the Examination (the "Out-of-Rank Promotions").[3] The promotions to the rank of sergeant based on the Examination occurred on five "Promotion Dates": December 16, 1988, July 16, 1990, November 16, 1990,

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[1] Opinions and briefs in this case have also referred to the Examination as the "1985-88 examination."

[2] For simplicity in writing, "race" and "racial" will be used in this opinion to refer to both the racial and national origin categories that are the subject of this lawsuit. The same analysis applies to both racial and national origin discrimination. Majeske v. City of Chicago, 218 F.3d 816, 819 n.1 (7th Cir. 2000), cert. denied, 531 U.S. 1079 (2001). In the jury instructions, African-Americans and Hispanics were jointly referred to as the "Identified Groups." Jury Instr. [330] 20. (The bracketed numbers used throughout today's opinion refer to the Docket Entry number of documents filed in the District Court.) Most of the capitalized terms that will be used in today's opinion are the terms that were used in the jury instructions, where an attempt was made to use neutral terminology, not necessarily the customary legal jargon.

[3] Jointly, the Score Adjustments and Out-of-Rank Promotions will be referred to as "Selection Preferences." During this litigation, the Score Adjustments made to the Examination have also been referred to as "racial standardization".

February 8, 1991, and September 16, 1991. See generally Petit v. City of Chicago, 31 F. Supp. 2d 604, 608-10 (N.D. Ill. 1998).[4]

When this case went to trial in January 2002, there were 82 remaining plaintiffs[5] and the only remaining defendant [6]

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[4] During the dozen years that this case has been pending, more than 10 opinions have been issued, not including those that were issued in the consolidated discovery proceedings, and most of the prior opinions are cited in today's opinion. In chronological order, the prior opinions are: Petit v. City of Chicago, 1991 WL 44830 (N.D. Ill. March 22, 1991) (motions to dismiss); Petit v. City of Chicago, 766 F. Supp. 607 (N.D. Ill. May 16, 1991) ("Petit I") (motions to dismiss); Petit v. City of Chicago, 31 F. Supp. 2d 604 (N.D. Ill. Sept. 11, 1998) ("Petit II") (summary judgment); Petit v. City of Chicago, 1999 WL 66539 (N.D. Ill. Feb. 8, 1999) ("Petit III") (collateral estoppel); Petit v. City of Chicago, 1999 WL 261706 (N.D. Ill. April 15, 1999) ("Petit IV") (reconsideration of collateral estoppel); Petit v. City of Chicago, 2001WL 629306 (N.D. Ill. May 25, 2001) ("Petit V") (collateral estoppel, summary judgment); Petit v. City of Chicago, 2001 WL 914457 (N.D. Ill. Aug. 13, 2001) ("Petit VI") (collateral estoppel); Petit v. City of Chicago, 2001 WL 1143163 (N.D. Ill. Sept. 27, 2001) ("Petit VII") (reconsideration of summary judgment); Petit v. City of Chicago, 2001 WL 1518549 (N.D. Ill. Nov. 29, 2001) ("Petit VIII") (pretrial order issues, reconsideration of summary judgment); Petit v. City of Chicago, 2002 WL 10481 (N.D. Ill. Jan. 3, 2002) ("Petit IX") (pretrial motions in limine); Petit v. City of Chicago, ___ F. Supp. 2d ___, 2002 WL 171978 (N.D. Ill. Jan. 31, 2002) ("Petit X") (jury instructions).

[5] This is not a class action. More than 300 plaintiffs individually joined in this action. Most of the other plaintiffs were dismissed on the ground that their claims for injunctive relief were moot and they had no claims for damages because they would not have been promoted to sergeant even if defendant had not applied the Selection

was the City of Chicago.[7] It was undisputed that defendant had adjusted the Examination scores of African-American and Hispanic candidates in a manner favorable to those candidates and that defendant also provided Out-of-Rank Promotions to Hispanics. See Jury Instr. [330] 17 ("Defendant does not dispute that it took race and national origin into account when promoting patrol officers to sergeant."). See also Petit II, 31 F. Supp. 2d at 608-10 (undisputed facts on summary judgment). Defendant contended that this intentional use of racial criteria was justified by three compelling interests: (a) remedying the effects at the sergeant rank of prior CPD discrimination in hiring and promotion (the "Discriminatory Effects Interest"); (b) avoiding an adverse impact violation of Title VII of the Civil Rights Act of 1964 (the "Adverse Impact Interest"); and (c) the CPD's operational need to have a diverse work force at the sergeant rank (the "Operational Need Interest"). Defendant also contended that these interests in combination (the "Combined Compelling Interest")

Preferences. See Petit II, 31 F. Supp. 2d at 614; Petit V, 2001 WL 629306 at *5-6. Fraternal Order of Police Lodge No. 7 ("FOP"), which represents certain CPD officers, had also been a plaintiff in this case, but its claims were dismissed for lack of standing and mootness. Petit II, 31 F. Supp. 2d at 615.

[6] Individual city employees that were named as defendants were previously dismissed as were all claims other than equal protection claims pursuant to 42 U.S.C. § 1983. Petit I, 766 F. Supp. 607.

[7] In an order dated November 28, 2001 [291], the court referenced a letter indicating plaintiff Stanley Surdej had died and directed that plaintiffs' counsel verify whether that was true and, if appropriate, timely substitute a personal representative. Counsel did not dispute that Surdej was deceased, but no action has been taken to substitute in a personal representative. The claims of Surdej will now be dismissed without prejudice. See Fed. R. Civ. P. 25(a) (1).

constituted a compelling interest and that the "Selection Preferences" employed were narrowly tailored to the compelling interests. See Jury Instr. [330] 17-18.

These issues of liability[8] were tried to the jury. The jury was to decide as to each Promotion Date, each Identified Group, and each type of Selection Preference, whether each compelling interest existed and, if so, whether the Selection Preference was narrowly tailored. See id. at 22, Verdict Form. As to most every issue, however, the jury was unable to reach a unanimous verdict and a mistrial was ultimately declared. The jury did unanimously agree and return a verdict as to the Discriminatory Effects Interest for the promotion of Hispanics on all five Promotion Dates. The jury found that that interest had been proven to exist, but did not make a unanimous finding as to whether any of the Score Adjustments or Out-of-Rank Promotions of Hispanics were narrowly tailored to that interest.

At the close of the evidence, plaintiffs moved for judgment as a matter of law on the ground that a collective bargaining agreement between the CPD and FOP (the "CBA") (see Pl. Exh. 3, Def. Exh. 59) required that the CPD make promotions without regard to race. Tr. Vol. VIII 163-64 (Jan. 29, 2002). Defendant argued that the issue was waived because not previously raised during the litigation. Id. at 164-65. Plaintiffs' motion was denied. Id. at 165. At the same time, defendant moved for judgment as a matter of law based on each of its asserted compelling interests. Id. at 165-72. Ruling on defendant's motion was reserved. Id. at 172.

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[8] Issues of damages were to be tried separately if there were any findings of liability.

On February 6, 2002, a mistrial was declared and the jury discharged. The order declaring the mistrial and the filing of the verdict form were both entered on the docket on February II, 2002. See Docket Entries 331, 333. On February 15, pursuant to Fed. R. Civ. P. 50(b), defendant moved for entry of judgment as a matter of law [335] and, on February 20, plaintiffs filed their motion for judgment as a matter of law [336]. Defendant thereafter moved to strike all aspects of plaintiffs' motion other than the argument based on the CBA, contending that the additional arguments were waived because not raised in the motion made at the close of evidence [339]. The following order was thereafter entered:

> Defendant City of Chicago's motion to strike Part II of plaintiffs' motion for judgment as a matter of law is denied without prejudice. To the extent defendant successfully argues that plaintiffs have waived the opportunity for a Rule 50(b) motion, plaintiffs' motion for judgment as a matter of law will be treated as a Rule 56 motion for summary judgment. The parties will not be required to file any Local Rule 56.1 statements, but they must provide adequate citations to the record in support of their factual assertions.

Order dated Feb. 26, 2002 [340].

As was clarified in part at a subsequent hearing on defendant's motion for reconsideration, see March 13, 2002 Tr., the parties are entitled to a ruling on their Rule 50 motions for judgment as a matter of law based on the trial record. To the extent all claims can be finally resolved on defendant's motion, judgment will be entered to that effect and the case is over in the district court. To the extent plaintiffs' motion was to be granted as to all compelling interests, damages would remain to be resolved, but the issue

of liability would be resolved in the district court. However, to the extent that no claims or only some of the claims can be resolved on the Rule 50 motions, the case would remain open in the district court and it would still be possible and appropriate to consider summary judgment motions. That is why the motions will be considered as summary judgment motions to the extent they raise issues not properly preserved for a Rule 50 motion or rely on evidence not presented at trial. Also, as was previously stated in court, even if the case can be resolved on one of the Rule 50 motions, the summary judgment issues will still be resolved so that there will be a complete record in the event any otherwise dispositive ruling is overturned or modified on appeal. Cf. Fed. R. Cir. P. 50©) (1).

II. RULE 50 MOTIONS

A. Rule 50 Standards

Rule 50(a) (2) of the Federal Rules of Civil Procedure provides: "Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." If a Rule 50(a) motion made at the close of all the evidence is not granted, the movant may renew the motion within ten days after the entry of judgment. Fed. R. Civ. P. 50(b).[9] If no verdict was returned, the court may order a new

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[9] To the extent the ten-day limitation of Rule 50(b) applies even when no judgment is entered, both motions are clearly timely since brought within ten days of the discharge of the jury. See Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2537 at 353 (2d ed. 1994).

trial or direct entry of judgment as a matter of law. Id. 50(b)(2). It is clear that a timely Rule 50(b) motion on issues that have been adequately preserved may and should be considered even though a mistrial has been declared. Evanston Hospital Corp. v. Astra Pharmaceutical Products, Inc., 1992 WL 220607 *1 (N.D. Ill. Sept. 3, 1992); Bostron v. Apfel, 104 F. Supp. 2d 548, 551 (D. Md. 2000), aff'd by unpublished order, 2 Fed. Appx. 235 (4th Cir.), cert. denied, 122 S. Ct. 218 (2001); Stokes v. Children's Hospital Inc., 805 F. Supp. 79, 80 (D.D.C. 1992), aff'd by unpublished order, 36 F.3d 127 (D.C. Cir. 1994); Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2537 at 162 (2d ed. 2002 Supp.). Also, to the extent the case cannot be resolved on the Rule 50(b) motions, it is appropriate to consider summary judgment. See Ross v. Hotel Employees & Restaurant Employees International Union, 266 F.3d 236, 243 (3d Cir. 2001), cert denied, 122 S. Ct. 1172 (2002).

Under the plain language of Rule 50(b), a Rule 50(a) motion for judgment as a matter of law must be made at the close of the evidence in order to be able to bring a posttrial Rule 50(b) motion for judgment as a matter of law. Laborers' Pension Fund v. A&C Environmental, Inc., 301F.3d 768, 775-76 (7th Cir. 2002); Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1364 (7th Cir. 1996). Rule 50(a) (2) also requires that the motion "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Thus, it is also the rule that issues that were not adequately preserved in a Rule 50(a) motion made at the close of evidence may not be included in a Rule 50(b) motion. A&C Environmental, 301 F.3d at 777-78; McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1555-56 (7th Cir. 1987); Rankin v. Evans, 133 F.3d 1425, 1431 (11th Cir.), cert. denied, 525 U.S. 823 (1998); Advisory Committee Notes to the 1991 Amendments to Rule

50(b). However, these waiver rules must be considered in light of Rule 50(b)'s purpose of requiring that a motion for judgment as a matter of law be made after the submission of all the evidence, but before the case is given to the jury, so as to afford the opposing party an opportunity to cure any defect in its case before the jury retires. A&C Environmental, 301F.3d at 777. The rule should not be strictly enforced when its rationale collapses under the circumstances of a particular case. Id. The Seventh Circuit has held that a failure to expressly state all grounds or expressly state a sufficient argument when the motion is presented at the close of the evidence will not result in waiver if previously presented arguments (in an earlier Rule 50(a) motion, in trial briefs, in motions in limine, on summary judgment, or otherwise) have made the moving party's position clear for the court and opposing party. Id. at 777-78; Ursa v. United States, 72 F.3d 59, 61 (7th Cir. 1995). Accord Rankin, 133 F.3d at 1432-33.

As to the merits of a Rule 50 motion for judgment as a matter of law, federal law provides the applicable standard. Deimer v. Cincinnati Sub-Zero Products Inc., 58 F.3d 341, 343 (7th Cir. 1995) (quoting Mayer v. Gary Partners & Co., 29 F.3d 330, 335 (7th Cir. 1994)). The standard is whether the evidence presented, combined with all reasonable inferences permissibly drawn, is legally sufficient to support the verdict when viewed in the light most favorable to the nonmovant. Fed. R. Civ. P. 50; Mutual Service Casualty Insurance Co. v. Elizabeth State Bank, 265 F.3d 601, 612 (7th Cir. 2001); Mathur v. Board of Trustees of Southern Illinois University, 207 F.3d 938, 941 (7th Cir. 2000); Collins v. Kibort, 143 F.3d 331, 335 (7th Cir. 1998). In other words, the test is whether no rational jury could return a verdict for the nonmovant. Mathur, 207 F.3d at 941; Dadian v. Village of Wilmette, 269 F.3d 831, 837 (7th Cir. 2001); Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d

627, 630 (7th Cir. 1996). The court may not reweigh the evidence, resolve conflicts in the testimony against the nonmovant, or override the jury's determinations as to the credibility of witnesses. EEOC v. Board of Regents of University of Wisconsin System, 288 F.3d 296, 301 (7th Cir. 2002); Grassi v. Information Resources, Inc, 63 F.3d 596, 599 (7th Cir. 1995). The standard is essentially the same as that for a motion for summary judgment. Hall v. Gary Community School Corp., 298 F.3d 672, 675 (7th Cir. 2002); Millbrook v. IBP, Inc., 280 F.3d 1169, 1179 n.2 (7th Cir. 2002); Klunk v. County of St. Joseph, 170 F.3d 772, 775 (7th Cir. 1999).

B. Plaintiffs' Rule 50(b) Motion

At the close of evidence, the only contention expressly raised by plaintiffs in their Rule 50(a) motion was the contention that defendant could not have had a compelling interest in providing Selection Preferences because such Preferences were prohibited by the CBA. In their Rule 50(b) motion, plaintiffs also argue that (a) defendant made an insufficient showing of past discrimination against African-Americans and Hispanics; (b) defendant failed to connect anecdotal testimony about past discrimination to its statistical evidence; (c) the testimony of defendant's statistical expert is deficient because based on assumptions that were not shown to be true; (d) the Selection Preferences were not narrowly tailored to any Discriminatory Effects Interest that was shown; (e) the Selection Preferences were not narrowly tailored to the Adverse Impact Interest because they went beyond the number necessary to avoid the regulatory 80% rule and any potential adverse impact violation could have been avoided by validating the test as job-related; and (f) the Operational Needs Interest was not shown to exist nor was there evidence of how many additional sergeants were needed

to satisfy any such interest (collectively, the "Additional Issues"). Defendant contends the Additional Issues are all waived because not included in plaintiffs' Rule 50(a) motion made at the close of the evidence.

1. Plaintiffs' Additional Issues

This case was pending for almost 12 years before it went to trial. Much of that time, the parties were occupied with discovery that was conducted in consolidated proceedings with other cases involving police promotions from the same time period. However, after the consolidated proceedings were completed, the parties had substantial time and opportunity to bring substantive motions and this court issued a number of written rulings. See Petit VII, 2001 WL 1143163 at *1 (summarizing proceedings through September 2001). The parties were provided with the opportunity to move for summary judgment on more than one occasion. See Petit II, 31 F. Supp. 2d 604; Petit V, 2001 WL 629306. See also Petit VII, supra (plaintiffs' motion to reinstate that essentially sought reconsideration of prior summary judgment rulings). The parties also filed various substantive motions related to collateral estoppel and a number of motions in limine that raised substantive issues. Additionally, the parties had the opportunity to address substantive issues in the final pretrial order and regarding jury instructions. Although the parties had these many opportunities to raise issues, the parties' submissions were often unfocused, particularly submissions from plaintiffs. Despite these many opportunities to raise issues as well as the opportunity to raise issues at the time the Rule 50(a) motions were presented, plaintiffs had not previously raised most of the issues contained in their Rule 50(b) motion, and certainly had not raised the more fact-oriented issues that go to the evidence that was actually presented at trial.

The only issue on which plaintiffs moved for summary judgment was the issue of narrow tailoring related to the Discriminatory Effects Interest. See Petit V, 2001 WL 629306 at *7-12. That argument was focused on certain aspects of Bernard Siskin's expert report[10] and is different from the contentions plaintiffs attempt to raise in their Rule 50(b) motion. Also, no summary judgment issue was raised concerning a failure to provide sufficient anecdotal evidence of discrimination and a failure to prove narrow tailoring related to the Adverse Impact or Operational Needs Interests. Plaintiffs did assert on a number of occasions that the Adverse Impact and Operational Needs Interests could not constitute compelling interests, but those are purely legal questions that are distinct from the facts supporting the Interests. Plaintiffs do not assert the purely legal issues in their Rule 50(b) motion [336] nor did they make the argument during their formal objections to the jury instructions. See Tr. Vol. VIII 109-41 (Jan. 29, 2002).

In ¶ 8 of their Rule 50(b) motion [336], plaintiffs assert: "Without first allowing argument from plaintiffs' attorney, at the close of the evidence, before the jury got the case, the court announced its conclusion that the City had produced a strong basis in the evidence for a compelling governmental interest and a narrowly tailored plan, for all three of its alleged interests. The court made no findings to support this broad conclusion." Where a court precludes a party from making its Rule 50(b) presentation, it may be found that issues not expressly raised were not waived. See A&C Environmental, 301 F.3d at 776. See also Ursa, 72 F.3d at

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[10] For purposes of summary judgment, it was assumed that Siskin's testimony would be consistent with his report. At trial, Siskin's testimony was consistent with his report.

61. Plaintiffs misstate the record. During the parties' opportunity to formally place their jury instruction objections on the record, plaintiffs objected to the instruction regarding the burden of proof. The court stated that, on the legal issue of defendant meeting the burden of production for its defenses, it would be found that defendant satisfied its burden of production as to a compelling interest and, therefore, the jury was only being instructed as to plaintiffs' burden to prove a negative. Tr. Vol. VIII 124-27 (Jan. 29, 2002).[11] The court did not find that defendant had proved a strong basis, instead indicating only that defendant had met its burden of production. More importantly, the court expressly stated that plaintiffs would be provided with the opportunity to address these fact issues and the court would rule thereon if the issues were subsequently raised on a "directed verdict" motion. Id.

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[11] Thereafter, the legal basis for the burden of production instruction and the allocation of factfinding responsibilities to the jury were more fully stated in Petit X, 2002 WL 171798. See also Reynolds v. City of Chicago, 296 F.3d 524, 526 (7th Cir. 2002) ("The jury in a discrimination case has the same responsibility to resolve factual disputes that it has in any other case, subject to the same standard of review."). Moreover, there would have been no point in drafting the instructions otherwise. Defendant admitted plaintiffs' prima facie case of intentional use of racial criteria. Therefore, if defendant failed to meet its burden of production as to any compelling interest, plaintiffs would have been entitled to judgment as a matter of law as to that compelling interest and there would have been no jury instructions as to that compelling interest. To the extent plaintiffs' expected Rule 50(a) motion was subsequently denied or reserved in part, instructions as to plaintiffs' burden of disproving the compelling interests would have been the only appropriate instructions to give. If the expected Rule 50(a) motion had subsequently been brought and granted in whole or in part, then it would just have been a matter of deleting from the existing draft instructions before actually instructing the jury.

at 126. When the time came for plaintiffs' presentation of their Rule 50(a) motion, they did not raise any issues regarding the evidence supporting defendant's asserted compelling interests or narrow tailoring; they only raised the CBA issue. The court was prepared to give serious consideration to an expected Rule 50(a) motion regarding all the compelling interests, though the decision may have been to reserve ruling as was done with defendant's Rule 50(a) motion.[12] Moreover, the prior indication that defendant had met its burden of production is different from the sufficiency of the evidence issue. Even though defendant met its burden of production and plaintiffs therefore continued to bear the burden of persuasion, evidence submitted by plaintiffs still could have been such that no rational juror could have done anything but find for plaintiffs. Contrary to what had been expected, this latter issue was never raised by plaintiffs nor ruled upon by the court; all the court did during the jury instruction conference was indicate it had found that defendant met its burden of production.

This is not a situation where the Additional Issues were preserved because clearly before the court even if not expressly raised in a Rule 50(a) motion. Plaintiffs have not preserved any issue for a Rule 50(b) motion other than the CBA issue. As previously stated, though, the other issues will be considered as summary judgment motions. This is largely to the same effect. Although summary judgment permits

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[12] Reserving the ruling has two benefits. It allows the jury to still reach a verdict and have the verdict available in the event the trial court improvidently grants judgment as a matter of law. Reserving ruling also allows for more careful consideration of the issue with the benefit of trial transcripts and without the time pressures of a waiting jury. See Advisory Committee Notes to the 1991 Amendments to Rule 50(b).

consideration of evidence other than that actually presented at the trial, neither side has presented much additional evidence.

2. The CBA Issue

The CBA in effect from February 7, 1990 through December 31, 1991,[13] provided in part:

> **Section 10.1 Equal Employment Opportunity**
>
> The Employer will continue to provide equal employment opportunity for all officers, and develop and apply equal employment practices.
>
> **Section 10.2 Non-Discrimination**
>
> The Employer shall not discriminate against officers, and employment-related decisions will be based on qualifications and predicted performance in

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[13] Plaintiffs' Exhibit 3 was admitted in evidence. That exhibit contains only the front page of the CBA showing it was in effect until December 31, 1991 and the page with sections 10.1 and 10.2. Defendant did not object to the admission of the contract other than that it was incomplete. Defendant's Exhibit 59 is the City Journal entry of February 7, 1990 showing the City Council's ordinance approving the CBA, including the entire text of the CBA. Exhibit 59 was not admitted into evidence. Instead, it was ruled that defendant could present whatever sections of the CBA it believed necessary to show completeness. Defendant, however, did not choose to present any additional sections. In their Rule 50(b) motion ([336] ¶ 4), however, plaintiffs cite to Exhibit 59 and the court relies on Exhibit 59 to show when the CBA went into effect. Neither side points to any evidence as to what CBA provisions were in effect in December 1988 or earlier.

> a given position without regard to race, color, sex, religion, age (40-63), or national origin of the officer . . . . Officers shall not be transferred, assigned or reassigned for reasons prohibited by this Section 10.2.

Plaintiffs contend that, as a matter of law, there cannot possibly be a compelling interest for voluntary affirmative action when applying the Selection Preferences violated the CBA that defendant had with its employees.

Defendant contends this issue is waived because not included in the complaint nor the final pretrial order. Plaintiffs allege in their First Amended Complaint that defendant made race-conscious promotion decisions. See First Am. Compl. [45] ¶ 26. They did not have to allege facts showing that no compelling interest existed justifying the use of race-conscious decisions. And even if defendant had expressly denominated a compelling interest as an affirmative defense, which it did not (See Def. Am. Answer to First Am. Compl. [112]), the Federal Rules of Civil Procedure do not require that a plaintiff reply to affirmative defenses. See Fed. R. Civ. P. 7(a). It is true that plaintiffs did allege the existence of certain personnel ordinances and regulations of the City concerning employment examinations and equal opportunity (First Am. Compl. [45] ¶¶ 17-22), but such allegation were not essential to plaintiffs' causes of action. Plaintiffs did not waive the CBA issue by failing to include in their complaint allegations regarding the CBA.

Defendant's other contention is that plaintiffs waived the CBA issue by not including it in their final pretrial order.[14]

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[14] There is no contention by defendant that plaintiffs failed to disclose the issue in response to any request for discovery that

Rule 16(e) of the Federal Rules of Civil Procedure provides that a final pretrial order "shall control the subsequent course of the action unless modified by a subsequent order." See also Gorlikowski v. Tolbert, 52 F.3d 1439, 1443 (7th Cir. 1995). Local Rule requires that, when ordered to do so by the court,[15] the parties must prepare a final pretrial order in compliance with the form set forth in the rules. See N.D. Ill. L.R. 16.1(a), Form 16.1.1. The form is to include an agreed statement or separate statements of contested issues of fact and law. Id. 16.1.1(2) (b). The final pretrial order also must include trial briefs which "are intended to provide full and complete disclosure of the parties' respective theories of the case. Accordingly, each trial brief shall include statements of . . . (c) the party's theory of liability or defense . . ., and (e) the party's theory of any anticipated motion for directed verdict. . . . Any theory of liability or defense that is not expressed in a party's trial brief will be deemed waived." Id. 16.1.1(9). "[T]he pretrial order is treated as superseding the pleadings and establishes the issues to be considered at trial." Gorlikowski, 52 F.3d at 1444 (quoting Erff v. MarkHon Industries, Inc., 781 F.2d 613, 617 (7th Cir. 1986)). Accord Nagy v. Riblet Products Corp., 79 F.3d 572, 575 (7th Cir. 1996). Evidence or theories not raised in the pretrial order are properly excluded at trial. Gorlikowski, 52 F.3d at 1444 & n.3. This rule also applies to raising contentions in a Rule 50 motion. See Maul v. Constan, 928 F.2d 784, 786-87 (7th Cir.

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would have required disclosure of plaintiffs' position. Neither is there any argument that plaintiffs waived the issue by not raising it at the time summary judgment was being considered.

[15] Orders entered in this case required that a final pretrial order be entered in full compliance with Local Rules 16.1 and 16.1.1 (formerly Local Rule 5.00). See Petit II, 31 F. Supp. 2d at 625-16; Petit VIII, 2001 WL 1518549.

1991); Morro v. City of Birmingham, 117 F.3d 508, 515-16 & n.3 (11th Cir. 1997), cert. denied, 523 U.S. 1020 (1998). Cf. Nagy, 79 F.3d at 575 (motion for a new trial). The pretrial order can be modified at trial, but only if the "stringent standard" is satisfied that modification is necessary to "prevent manifest injustice." Fed. R. Civ. P. 16(e); Gorlikowski, 52 F.3d at 1444.

Here, plaintiffs submitted a trial brief and statements of contested issues of law and fact. None of those documents makes any mention of the CBA. The only reference to the CBA in the final pretrial order is plaintiffs' inclusion of the excerpt as a listed exhibit. The legal theory associated with the CBA, however, is not mentioned. Additionally, this issue had never been raised on summary judgment or otherwise during pretrial proceedings. Because plaintiffs did not include this issue in the final pretrial order, it was not properly preserved to be raised in a Rule 50 motion, either at the close of evidence or postverdict.

Although the CBA issue is waived for purposes of being raised in a Rule 50 motion, it is not necessarily waived for purposes of being raised on summary judgment. The pretrial order presently in place controls proceedings that occurred at trial and posttrial motions directed to that trial; it does not control subsequent proceedings following a mistrial or grant of a new trial. Johns Hopkins University v. CellPro, Inc., 152 F.3d 1342, 1357 (Fed. Cir. 1998). If defendant's Rule 50(b) motion is denied, plaintiffs would be free to raise on summary judgment any issues that have not been otherwise waived or dismissed in pretrial proceedings.

Even if the pretrial order continues to control after a mistrial, it would be appropriate to permit modification prior to a second trial. In determining whether it is appropriate to

permit modification to avoid manifest injustice, the court must "weigh the possible hardships imposed on the respective parties by allowing or refusing to allow the order to be modified; the court must also balance the need for doing justice on the merits between the parties (in spite of the errors and oversights of their attorneys) against the need for maintaining orderly and efficient procedural arrangements." Gorlikowski, 52 F.3d at 1144 (quoting Matter of Delagrange, 820 F.2d 229, 232 (7th Cir. 1987)). Factors to consider include: "(1) the prejudice or surprise to the nonmoving party, (2) the ability of the party to cure the prejudice, (3) the extent of the disruption to the orderly and efficient trial of the case or other cases in the court, and (4) the bad faith and willfulness in failing to comply with the court's order." Ryan v. Illinois Department of Children & Family Services, 185 F.3d 751, 763 (7th Cir. 1999).

Defendant may have been surprised when the CBA issue was first raised during plaintiffs' Rule 50(a) motion. At this point in time, however, defendant would no longer be surprised by the issue and has had adequate opportunity to brief it. Moreover, there is no contention by defendant that it would have engaged in additional discovery had it known this issue would be presented by plaintiffs. Defendant suffers no undue prejudice by permitting the issue to be raised at this time. Permitting the issue to be raised after Rule 50(b) motions are resolved and before proceeding to a new trial does not interrupt an orderly and efficient retrial of the case. There is no indication that plaintiffs intentionally delayed raising this issue to gain an advantage. To the extent the issue is meritorious and dispositive of liability, it would have been to plaintiffs' advantage to raise the issue previously and avoid some litigation costs. Additionally, to the extent the issue is meritorious, it would serve justice to permit plaintiffs to now raise this issue. Therefore, even if the final pretrial order still

limits the issues that are before the court, that order would, after resolution of defendant's Rule 50(b) motion, be modified to permit plaintiffs to raise the CBA issue on summary judgment or at a second trial. This issue will be addressed below in § III (c)(1).

C. Defendant's Rule 50(b) Motion

Defendant timely moves for judgment as a matter of law on its Discriminatory Effects Interest. Its Rule 50(b) motion and supporting brief raises this Interest only; it does not raise an issue as to the other two claimed compelling interests. See Def. Motion for Entry of Judgment as a Matter of Law [335] ¶ 6; Def. Memo. of Law in Support of Motion for Judgment as a Matter of Law [346]. After the court ruled that plaintiffs' Rule 50(b) motion could, in the alternative, be treated as a summary judgment motion, defendant responded to plaintiffs' motion and additionally requested that summary judgment be granted in its favor based on all three of its claimed compelling interests. See Def. Response to Pl. Motion for Judgment as a Matter of Law [350] at 1-2 & n.2.

Summary judgment will be addressed in § III, infra. Unlike the Rule 50(b) motion, summary judgment permits consideration of evidence in addition to that presented at trial. Neither side, however, has relied on much additional evidence. The general facts and general legal principles set forth in the following two subsections apply to both sides' summary judgment motions as well.

1. General Facts

The facts taken as true for purposes of ruling on summary judgment in 1998, see Petit II, 31 F. Supp. 2d at 608-10, were generally indisputably proven at trial as well.[16] No rational jury could find other than the following facts.

Beginning in 1970, various lawsuits were filed challenging the procedures for promoting Chicago police officers as being discriminatory. The 1973 and 1978-79 sergeant examinations were found to be discriminatory and affirmative relief was granted to benefit African-Americans, Hispanics, and women, including the imposition of some quotas. In light of this past history, the City developed the Examination that is the subject of the present litigation. Claims regarding the Examination were raised in United States v. City of Chicago, No. 73 C 2080 (N.D. Ill.) ("City of Chicago")In City of Chicago, the City moved to impose a quota that would make adjustments favoring Hispanics and women, but that motion was denied. See Petit I, 766 F. Supp. at 609. A number of the plaintiffs in the present case intervened in City of Chicago. The intervenors' claims were subsequently dismissed, some with prejudice and some without prejudice. It was previously held that this dismissal has a preclusive effect on all the individual plaintiffs in the present case. Petit I, 766 F. Supp. at 610-13. Claims dismissed with prejudice in City of Chicago were not to be relitigated in the case sub judice. Plaintiffs were not precluded from challenging the racial standardization of raw scores; they were precluded from challenging both a scoring method that resulted in scores bunched in a narrow range and

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[16] On defendant's motion in limine, it was held that certain undisputed facts from the summary judgment motion were deemed admitted at trial. See Petit IX, 2002 WL 10481 at *6.

the elimination of certain questions from use in the final scoring.

The Examination developed by defendant consisted of four parts for which it was determined the following weights would be applied: (a) written multiple choice (28%); (b) written short answer (29%); (c) oral examination (40%); and (d) performance evaluations (3%). The points assigned to each part added up to a total possible score of 100 points. The multiple choice examination was administered in 1985 and the short answer and oral examinations in 1988. All patrol officers who had completed their probationary period by the time the Examination began were eligible. 3416 officers took all parts of the examination, 2274 Whites (66.6%), 931 African-Americans (27.2%), and 192 Hispanics (5.6%). At the time the Examination was developed and scored, defendant anticipated promoting approximately 500 patrol officers to sergeant.

Adjustments were also made to standardize the grading of the different raters who scored the short answer and oral examination parts.[17] This aspect of the standardization was not based on the rater's race. As to the short answer examination, one standardization was performed to adjust for raters and a separate standardization was performed to adjust for the race of the applicant. For the oral examination, though, a single standardization was performed taking into account both the rater and the race of the applicant. For this litigation, this standardization was recalculated, in separate

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[17] This standardization was based on rank ordering the scores given by a particular rater, then assigning a point score to each applicant based on a standard deviation above and below a set median point score.

steps for the oral examination rater standardization and the standardization based on the applicant's race. Thus, assuming no other adjustments would have been made, it can be determined what the rank order of applicants would have been had no racial standardization been performed.[18]

Absent racial standardization, the top 500 candidates (which is the approximate number of officers the City expected to promote) would have been composed of 416 Whites (83.2%), 66 African-Americans (13.2%), and 18 Hispanics (3.6%). By comparison, the racial composition of those who completed the application process was 66.6% White, 27.2% African-American, and 5.6% Hispanic. Stated a different way, absent racial standardization, 18.3% of White applicants were in the top 500, 7.1% of African-American applicants, and 9.4% of Hispanic applicants. If only the top 458 (the number actually promoted) are considered, 16.8% of the White applicants would have been promoted, 6.4% of the African-American applicants, and 7.8% of the Hispanic applicants.

The highest possible score was 100. On this 100-point scale, a difference of 2 or 3 points could make a substantial difference in the rank order. For example, using the racially unstandardized scores, the person ranked 630 had an 81.90 score and the person ranked 430 had an 83.59 score. The lowest-scoring Hispanic applicant among the racially standardized top 500 had a racially unstandardized score of

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[18] The undisputed evidence at trial was that, absent the racial standardization, the unadjusted scores would not have been used. The testimony was that one likely possibility would have been to determine a cutoff for qualified candidates, but not to use the rank orders above the cutoff.

80.95 (rank 774) and a racially standardized score of 83.43 (rank 417). The lowest-scoring African-American applicant among the racially standardized top 500 had a racially unstandardized score of 80.70 (rank 854) and a racially standardized score of 82.82 (rank 497). During this litigation, plaintiffs contended that the differences are made to appear artificially small by arbitrarily selecting a 100-point scale and by the standard deviation used for the rater standardization. As plaintiffs have pointed out, the raw score differences may be substantially larger (at least viewed on an absolute scale). Plaintiffs, however, have been precluded (based on prior litigation) from directly challenging the scaling and standard deviation methodology the defendant chose to employ. Additionally, defendant presented undisputed evidence at trial supporting that the test had a standard measure of error of more than three points. That indicates that differences in scores of a few points are not significant. Moreover, plaintiffs presented no evidence from which a rational jury could find that differences of a few points on the test would be a significant predictor of job performance.

The City chose to standardize scores by race. In doing this, the City assumed that, by group, Whites, African-Americans, and Hispanics all would have scored equally on a non-biased test. Therefore, the scores for African-Americans and Hispanics were adjusted so that each group would be represented in the top 500 candidates in essentially the same proportion as their representation among applicants. Following racial standardization, the top 500 applicants consisted of 332 Whites (66.4%), 138 African-Americans (27.6%), and 30 Hispanics (6.0%). Stated another way, after racial standardization, 14.60% (332/2274) of White applicants were ranked in the top 500, 14.82% (138/931) of African-American applicants, and 15.63% (30/192) of Hispanic applicants. The racially unstandardized scores were 82.98 for

the 332nd White applicant, 80.70 for the 138th African-American applicant, and 80.95 for the 30th Hispanic applicant.

Between December 1988 and September 1991, 458 patrol officers were promoted to sergeant. 402 of the promotions were based on the rank order of the 1988 eligibility list derived from the racially standardized 1985-88 examination. The other 56 promotions were Out-of-Rank Promotions. Of the 458 officers promoted, 298 (65.07%) were White, 119 (25.98%) were African-American, and 41 (8.95%) were Hispanic. The 1988 eligibility list was canceled on October 9, 1992. A new sergeant promotional examination was administered in 1993.

2. General Legal Principles

Because this case concerns promotional decisions of a municipal entity that were influenced by race, strict scrutiny applies to defendant's use of the Selection Preferences. Majeske, 218 F.3d at 819. To survive strict scrutiny, the Selection Preferences must have promoted a compelling interest. Reynolds, 296 F.3d at 526; Majeske, 218 F.3d at 820. There must be a strong basis in the evidence supporting the existence of a compelling interest. Builders Association of Greater Chicago v. County of Cook, 256 F.3d 642, 645 (7th Cir. 2001); Clark v. Putnam County, 293 F.3d 1261, 1273 (11th Cir. 2002); Engineering Contractors Association of South Fla. Inc. v. Metropolitan Dade County, 122 F.3d 895, 906-07 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998); Contractors Association of Eastern Pa., Inc. v. City of Philadelphia, 91 F.3d 586, 597 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997); Concrete Works of Colorado, Inc. v. City & County of Denver, 36 F.3d 1513, 1521-22 (10th Cir. 1994), cert. denied, 514 U.S. 1004 (1995).

To survive strict scrutiny, the Selection Preferences must also have been narrowly tailored. Reynolds, 296 F.3d at 526; Chicago Firefighters Local 2 v. City of Chicago, 249 F.3d 649, 657 (7th Cir.), cert. denied, 122 S. Ct. 465 (2001); Majeske, 218 F.2d at 820. "To determine whether an affirmative action plan is narrowly tailored, the test we use is whether the racially preferenced measure is 'a plausible lower-bound estimate of a shortfall in minority representation' that is caused by past discrimination." Majeske, 218 F.3d at 823 (quoting McNamara v. City of Chicago, 138 F.3d 1219, 1224 (7th Cir.), cert. denied, 525 U.S. 981 (1998)). Aside from the numbers, general factors to consider include "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion) (cited in Majeske, 218 F.3d at 824).

Here, the asserted compelling interests are not limited to remedying past discrimination. Defendant also raises the Operational Need Interest and the Adverse Impact Interest. While the basic measuring standard is still "a plausible lower-bound estimate of a shortfall in minority representation," it must be measured by the particular compelling interest being considered. The above-quoted passage from Majeske, 218 F.3d at 823, concerned a discriminatory effects interest and therefore was measured by the minority shortfall caused by past discrimination. For the Operational Need Interest, the measuring standard involves the shortfall of minority sergeants necessary to serve the CPD's operational needs and for the Adverse Impact Interest the measuring standard involves the shortfall of minority promotions necessary to avoid an adverse impact violation. Thus, for purposes of

narrow tailoring, each particular Interest is measured against a different goal. As the discussions below will indicate, this means the estimated lower-bound number of minority promotions needed to serve a particular Interest must be particularized to that Interest, thereby producing a different minimum estimated quantity of promotions that would serve each particular Interest. Because narrow tailoring for each Interest is measured against a different estimated quantity, it would not be inconsistent to hold that (a) the undisputed facts only support that narrow tailoring is satisfied for one Interest; (b) the undisputed facts only support that narrow tailoring cannot be satisfied as to a second Interest; and (c) a genuine factual dispute remains as to whether narrow tailoring is satisfied for the third Interest.

Defendant had the burden of producing evidence of a compelling interest and narrow tailoring. With the burden of production met, the burden of persuasion remained with plaintiffs to show a lack of a compelling interest and/or a failure to narrowly tailor. Majeske, 218 F.3d at 820; Dade County, 122 F.3d at 917; Philadelphia, 91F.3d at 957.

Consistent with these legal principles, the jury was instructed as to plaintiffs' burdens regarding compelling interests and narrow tailoring. See Jury Instr. [330] 22-26, 34-36. The burden of production of defendant was a legal question for the court and therefore no instruction was given as to defendant's burden. See Petit X, 2002 WL 171978 at *1 n.2. Initially, this court ruled that post-implementation or post-enactment evidence could not be the support for the compelling interest showing. "As to each particular compelling interest, the City must show that, during the pertinent time period, it had a strong basis for finding the particular compelling interest to be present. It cannot rely on a post-1991 factual basis as constituting the necessary strong

basis in the evidence." Petit IX, 2002 WL 10481 at *4. On the other hand, it was held that post-implementation evidence was admissible to show narrow tailoring. Id. On reconsideration prior to the beginning of the trial, see Order dated Jan. 14, 2002 [319], it was held that post-implementation evidence was also admissible as evidence of a compelling interest and that it was only necessary to have some evidence of a compelling interest at the time the Selection Preference was being implemented. See Jury Instr. [330] 23, 25-26; Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1166 & n.11 (10th Cir. 2000), cert. dismissed 534 U.S. 103 (2001); Dade County, 122 F.3d at 911; Contractors Association of Eastern Pa., Inc. v. City of Philadelphia, 6 F.3d 990, 1003-06 (3d Cir. 1993), cert. denied, 519 U.S. 1113 (1997); Coral Construction Co. v. King County, 941 F.2d 910, 920-21 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992). See, e.g., Reynolds, 296 F.3d at 529-30 (referring to expert testimony in support of compelling interest that would not have existed at the time the promotions at issue were implemented); Majeske, 218 F.3d at 820-21 (same). But see In re City of Memphis, 293 F.3d 345, 350-51 (6th Cir. 2002); Rothe Development Corp. v. United States Department of Defense, 262 F.3d 1306, 1324-28 (Fed. Cir. 2001).

The jury was instructed as follows and the law stated therein will be applied in today's ruling.

> In order to find that, on a particular Promotion Date, a compelling interest existed to apply a particular Selection Preference for one of the Identified Groups, each of the following propositions must be found:

(1) The particular compelling interest motivated defendant to apply a Selection Preference(s) for the particular Identified Group;

(2) At the time, some evidence supported that the particular compelling interest existed as to that Identified Group; and

(3) A strong basis supports that the particular compelling interest existed as to that Identified Group.

In making this determination, you must keep in mind that the burden of proof is on plaintiffs. Therefore, you must find that a compelling interest existed as to a particular Promotion Date and Identified Group unless plaintiffs prove by a preponderance of the evidence that one or more of the above propositions is not true.

* * *

As used in these instructions, "some evidence" means specific evidence known and considered by defendant (through its agents and employees) on or before the Promotion Date and which provided support for the existence of the compelling interest.

As used in these instructions, a "strong basis" means sufficient evidence upon which reasonable persons, making decisions about serious and important matters, would rely to infer that a particular fact is likely true.

A strong basis does not require proof that the underlying facts actually are true, only such evidence

from which a reasonable person could infer the particular facts are likely true.

In determining whether a strong basis existed, you are to consider all the evidence that is before you regardless of whether it was actually known by or considered by defendant as of the Promotion Date.

* * *

In making the narrowly tailored determination you must keep in mind that the burden is on plaintiffs to prove by a preponderance of the evidence that a particular Selection Preference was not narrowly tailored to the particular compelling interest, Promotion Date, and Identified Group.

* * *

"Narrowly tailored" means that the Selection Preference was implemented in a manner that resulted in the promotion of a lower-bound estimate of the number of Identified Group members necessary to be promoted in order to serve the compelling interest which you found existed. In other words, that it discriminates against Whites as little as possible consistent with effective remediation.

Aside from the number of Identified Group members promoted through the application of the Selection Preference, general factors you may consider include the necessity for the relief and the efficacy of possible alternatives; the flexibility and duration of the relief; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

> In determining whether the Selection Preference was narrowly tailored to the particular compelling interest, Promotion Date, and Identified Group under consideration, you are to consider all the relevant evidence in the case, including facts and evidence that were or were not known to defendant (through its agents and employees) as of the particular Promotion Date. The question to resolve is whether the Selection Preference was narrowly tailored as implemented.

Jury Instr. [330] 23, 25-26, 35-36.

3. Discriminatory Effects Interest

A combination of persuasive statistical data and anecdotal evidence of past discrimination is adequate to establish a compelling interest to cure the effects of past discrimination. Majeske, 218 F.3d at 822; McNamara, 138 F.3d at 1223-24; Adarand, 228 F.3d at 1166; Wessmann v. Gittens, 160 F.3d 790, 802-03 (1st Cir. 1998). Since defendant met its burden of production on this issue, the burden was on plaintiffs to show by a preponderance of the evidence that the Discriminatory Effects Interest did not exist. As to the promotion of Hispanics, the jury found that the Discriminatory Effects Interest existed as of each Promotion Date. Since plaintiffs did not preserve any challenge based on the sufficiency of the evidence supporting that finding, see § II (B)(1), supra, it must be taken as established that a Discriminatory Effects Interest existed regarding the promotion of Hispanics. For defendant to be entitled to judgment as a matter of law on any of those claims, however, it must also be held that, as to particular Selection Preferences and Promotion Dates, a rational jury could only find the particular Selection Preference for Hispanics was narrowly tailored.

As to the promotions of African-Americans, it must also be considered whether a rational jury could only find that the Discriminatory Effects Interest existed. Plaintiffs do not raise any issue as to defendant being motivated by a perceived Discriminatory Effects Interest or there being some contemporary evidence of the Discriminatory Effects Interest. Plaintiffs' contention is that the strong basis requirement is not satisfied.

As to the Discriminatory Effects Interest, the jury was instructed as follows.

> An interest in remedying the effects of prior discrimination can constitute a compelling interest. For the Discriminatory Effects Interest to constitute a compelling interest, the prior discrimination by Chicago Police Department supervisors must have continued to have had a significant and pertinent then-present effect. In the present case, that means sufficient evidence of a prior discrimination against the Identified Group that significantly affected the number of Identified Group sergeants as of the Promotion Date under consideration.

Jury Instr. [330] 27.

Pretrial rulings in this case established that plaintiffs were estopped from denying that African-American and Hispanic police officers and applicants had suffered a significant degree of certain employment discrimination prior to 1989. See Petit IX, 2002 WL 10481 at *7; Petit III, 1999 WL 66539 at *5, reconsideration denied, Petit IV, 1999 WL 261706. The established facts were stated as follows for the jury.

Based on prior court findings, the following facts are established.

1. In the decades prior to 1989, African-American patrol officers were subjected to intentional, unfavorable treatment in assignments (for example, segregated beats, restricted duties, and unfair efficiencies[19]).

2. In the decades prior to 1989, African-Americans and Hispanics were subjected to intentional, unfavorable treatment in hiring for patrol officer positions (for example, in the use of medical and entrance qualifications).

3. In the decades prior to 1989, supervisory police officials acted in ways that were hostile to and tolerated acts of hostility toward African-American and Hispanic patrol officers.

The exact extent of the discrimination and the effect, if any, that it had on the number of African-American and Hispanic sergeants in the Chicago Police Department as of the years at issue in the present case is for you to decide.

Jury Instr. [330] 19.

These collateral estoppel facts do not establish the precise extent of the past discrimination nor the impact it had on the number of CPD sergeants as of 1988 through 1991. See Petit

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[19] "Efficiencies" is a term used by the CPD for employee evaluations.

III, 1999 WL 66539 at *5; Petit IV, 1999 WL 261706 at *1-2. In combination with sufficient statistical evidence, however, it would be sufficient to establish a Discriminatory Effects Interest as to the promotion of African-Americans. Anecdotal evidence would not necessarily have been required as well, but was nevertheless presented. A number of current and former African-American police officers testified regarding their experiences. Plaintiffs contend their testimony as to discriminatory hiring practices is impeached by the fact that all four were hired and were promoted to high ranks: lieutenant, deputy superintendent, or superintendent. It is not surprising, however, that the witnesses that defendant found to testify were long-time officers of high rank; persons who would be more likely to have an established relationship with current City officials. That these witnesses succeeded in being promoted does not significantly undermine anecdotal testimony as to their treatment and the treatment of other African-Americans. While plaintiffs' cross-examination raised questions as to some of the specific anecdotes--questions that must be resolved in plaintiffs' favor on defendant's Rule 50(b) motion--there is substantial unrebutted, admissible evidence of discrimination against African-Americans. Viewed alone--or even more so when considered along with the collateral estoppel facts--this evidence conclusively establishes substantial discrimination that could have led to a substantial decrease in the number of African-American sergeants as of the Promotion Dates of 1988 through 1991. The key question is whether the statistical evidence is sufficient--when considered with the other evidence--to conclusively establish a substantial diminution of African-American sergeants caused by discrimination.

The statistical evidence consisted of Siskin's testimony and documentary evidence establishing the statistics that underlay Siskin's analysis. The key aspect of Siskin's analysis was his

projection as to the number of African-American and Hispanic sergeants that there would have been from 1988 through 1991 if not for prior CPD discrimination against African-Americans and Hispanics. Siskin compared his projected figures with the actual number of African-American and Hispanic sergeants.

The Chicago Police Department only promotes from within. To become a sergeant, one must first be a patrol officer. For purposes of his analysis, Siskin had to determine how many minorities and women would have been hired as patrol officers if not for discrimination in hiring. Siskin assumed that hiring discrimination had been eliminated by 1977. For 1977 to 1990, he then compared the percentages for actual hires to the percentages of those minorities in the 20-34 age group of Chicago's population. For this time period, he found that African-Americans among the new hires represented .95 of their proportion of the Chicago population and Hispanic new hires represented .676 of their proportion of the Chicago population. Using these ratios and population data for each year,[20] Siskin estimated how many African-Americans and Hispanics would have been hired as patrol officers from 1950 to 1974 if not for discrimination. Taking into account the percentage of actual patrol officer hires from each past year who actually were sergeants during the 1987-91 time period, Siskin estimated the number of African-

American and Hispanic sergeants there would have been during the 1987-91 time period if not for discrimination in hiring and promotion.

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[20] Siskin also made adjustments because of the changing participation of females in the work force.

According to Siskin's calculations, the actual number of African-American sergeants as compared to the expected number (that is, the estimated number if not for discrimination) were as follows for each year: 1987-269/338; 1988-294/367; 1989-282/354; 1990-287/365; 1991-282/371. For Hispanics, the yearly figures are as follows: 1987-44/55; 1988-62/66; 1989-61/65; 1990-66/70; 1991-67/74. Thus, according to Siskin's analysis, both before and after the promotions involving Selection Preferences, there were less African-American and Hispanic sergeants than there would have been if there had been no discrimination in hiring or promotions.

At trial, plaintiffs did not present an alternative analysis of the data, seek to recalculate Siskin's projections, or otherwise present their own projections. Instead, plaintiffs' present contention is that Siskin's analysis should be disregarded and accorded no weight because it is based on assumptions that are unsupported by the evidence. The two assumptions that plaintiffs challenge as unsupported are that (a) discriminatory hiring of patrol officers did not occur between 1977 and 1990 and (b) hiring requirements did not change during that time period.

The assumption of a period of nondiscriminatory hiring (at least as against Whites[21]) is essential to Siskin's analysis. If African-Americans and/or Hispanics were receiving favorable treatment in hiring during this time period, hiring statistics from that time period cannot be used (as a yardstick) to

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[21] The pertinent group is actually non-African-Americans and non-Hispanics, which would include Asians and Native Americans as well. Unless otherwise indicated, here "White" will be used to refer to those who are neither African-American nor Hispanic.

determine the nondiscriminatory hiring ratios that were necessary for projecting nondiscriminatory hiring for prior years. If plaintiffs presented evidence from which a rational jury could find by a preponderance of the evidence that discrimination against Whites was occurring during this time period, then defendant could not be entitled to judgment as a matter of law.

Evidence at trial (as well as judicial notice of court orders) indisputably show that, beginning with use of the 1971 hiring examination, the CPD imposed certain racial quotas for hiring patrol officers. However, the evidence also indisputably shows that those quotas ended in 1976. No formal quotas for hiring existed from 1977 forward.

Plaintiffs rely on documents that they submitted in evidence, but for which no or little related testimony was presented at trial. See Pl. Exh. 36-39. Exhibits 36 and 37, which concern a 1976 eligibility list used for patrol officer hires from October 1976 through March 1982, are not self-explanatory. The data that plaintiffs seek to derive from these exhibits is not information that can be considered to have been before the jury. An affidavit of Robert Joyce that defendant provides in response to plaintiffs' motion, however, does confirm the data plaintiffs seek to derive from these two exhibits. See Joyce Aff. ¶¶ 5-11 ([351] Exh. 4). Therefore, the information could be considered on summary judgment. But even assuming the data as to hiring from the 1976 list was before the jury, it is not a basis for finding that discriminatory hiring existed. The data plaintiffs rely upon is that White males represented 50.2% of the qualified candidates, but only 48.8% of those actually hired. Plaintiffs contend this shows discriminatory hiring.

First, as this court has previously held, the group to focus on is Whites of both genders, not just White males. See Petit IX, 2002 WL 10481 at * 9. But a breakdown between Whites (including Asians and others) and African-Americans/Hispanics also shows a discrepancy similar to that for White males alone. Whites represented 64.2% (700/1104) of the qualified candidates, but only 59.8% (904/1511) of those actually hired. Still, the data is incomplete because the percent qualified data includes "well qualified" and "qualified" candidates, but does not include "conditionally qualified" candidates, at least 407 of which were hired (1511 minus 1104). But even assuming Whites also represented 64.2% of the conditionally qualified candidates, discrimination cannot be inferred. As plaintiffs repeatedly argue themselves, discrimination cannot be inferred from statistics alone. See Chavez v. Illinois State Police, 251 F.3d 612, 640 (7th Cir. 2001); Rummery v. Illinois Bell Telephone Co., 250 F.3d 553, 559 (7th Cir. 2001); Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617-18 (7th Cir. 2000); Adreani v. First Colonial Bankshares Corp., 154 F.3d 389, 400 (7th Cir. 1998). Plaintiffs do not point to evidence that, combined with the statistical evidence, would be sufficient to draw an inference of discrimination. Moreover, as defendant points out, there are other possible explanations for the discrepancy between eligibility rates and actual hiring. For example, it may be that Whites have a wider range of employment opportunities and therefore follow up on their eligibility at a somewhat lower rate than African-Americans and Hispanics. See Middleton v. City of Flint, Mich., 92 F.3d 396, 408-09 (6th Cir. 1996), cert. denied, 520 U.S. 1196 (1997). There is no evidence that the differences between eligibility rates and hiring rates resulted from CPD officials intentionally offering positions to qualified African-Americans and Hispanics at a greater rate than they offered positions to Whites.

The evidence regarding the 1982 and 1986 eligibility lists for patrol officer hiring is different. Exhibits 38 and 39,[22] as well as the trial testimony of Joyce (Jan. 16, 2002 Tr. at 174-79), support that certain racial percentages were used at two steps of the hiring process for both eligibility lists. The 1982 list was used from June 1982 until August 1986. The 1986 list was used from September 1986 until May 1988. For both lists, a written examination was given and scored. There is no evidence that race or gender was considered in scoring the written examination for either list.[23] The test was scored on a pass/fail basis. Only those who passed were eligible to go to the Assessment Center for further evaluation. However, Plaintiffs' Exhibits 38 (1982 list) and 39B (1986 list), as well as Joyce's testimony (as to both lists), support that race and gender were used in determining who would be sent to the Assessment Center. Although only those with passing scores were sent to the Assessment Center and they were sent in score order, candidates were sent in approximately the same

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[22] Exhibit 39A is a June 4, 1982 court order in the City of Chicago case requiring that new officers be appointed from the 1982 list in the same ratio as their race/gender group was represented in the applicant pool. Exhibit 39B is a document the City filed in the City of Chicago case entitled "Report to the Court on 1985/86 Police Officer's Examination." It was admissible as a party admission and may be considered for the truth of the matters contained therein. See Fed. R. Evid. 801(d) (2) (A).

[23] The 1986 list was based in part on two different written tests which were given to different candidates depending on the date they were tested. Because the distribution of scores on the two tests differed, the results were standardized so that the results of each test had the same mean and standard deviation. Such standardization was done within racial/gender groups, but this did not affect the rankings between different groups, only the ranking within a particular group.

ratio as their group was represented in the applicant pool. The categories were White male, minority (African-American and Hispanic) male, and female. In determining the 1982 list, each group sent to the Assessment Center was 30% White male, 42% minority male, and 28% female. In determining the 1986 list, each group sent to the Assessment Center was 31% White male, 37% minority male, and 32% female. A final score was then determined without regard to race or gender. However, candidates were then selected from the qualified lists in approximately the same ratio as their group had been represented in the eligible pool for the 1982 list and the original applicant pool for the 1986 list.

As to the 1982 list, the racial breakdown of those who took the written test was 51.0% African-American, 9.8% Hispanic, and 39.2% White. Pl. Exh. 38 at 1. Broken down by the racial/gender groups that were the categories used in the contemporary litigation, candidates taking the written test were 42.2% minority male, 29.8% White male, and 28.0% female. Id. Those passing the written examination and thus eligible for the Assessment Center were: 33.3% African-American, 8.2% Hispanic, and 58.5% White; or 28.6% minority male, 43.8% White male, and 27.6% female. Id. at 2. Those eligible following the Assessment Center ratings were 35.4% minority male, 34.0% White male, and 30.6% female. Id. at 3.[24] Plaintiffs also point to evidence, Pl. Exh. 50 at 2, that the hired African-American with the lowest score had a score of 44.02 while the hired White male with the

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[24] No separate breakdown is provided by race alone.

lowest score had a score of 46.13.[25] From Pl. Exh 36, it can be computed that the breakdown of those actually hired from the 1982 list was 34.6% minority males, 34.2% White males, and 31.2% female.[26]

As to the 1986 list, the breakdown of those who applied to take the written tests was 39.4% minority male, 23.4% White male, 32.0% female, and 5.2% were missing data. Pl. Exh. 39B.[27] However, only two-thirds of those who applied actually took the written tests. The breakdown of those who took the written tests was 37.3% minority male, 31.1% White male, and 31.6% female. White males had a higher pass rate on the written test (85.4%) than females (67.2%) and minority males (56.9%). Thus, the breakdown for those candidates who passed the written test was 30.7% minority male, 38.5% White male, and 30.8% female. Those persons who were sent on to the Assessment Center were at the same approximate ratio as those who took the written test. The breakdown of those who passed following the Assessment Center's scoring and therefore were eligible for hire was

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[25] It is unclear from the document whether the score is the written test score or the score after the Assessment Center scoring. To the extent a difference is relevant, it is the Assessment Center score, not the written test score, that ultimately determined who was hired.

[26] No separate breakdown is provided by race alone and other evidence in the record is insufficient to determine the racial breakdown of hires from the 1982 list.

[27] Other tables in Exh. 39B include those with missing data in the White male category. Doing this for those who took the written tests, the White male percentage is 28.6%. Exhibit 39B does not contain a breakdown by race only.

31.8% minority male, 37.0% White male, and 31.2% female. As with the written test, the pass rate for the Assessment Center scoring was highest for White males (88.0%), as compared to females (82.7%) and minority males (72.7%). From Pl. Exh 36, it can be computed that the breakdown of those actually hired from the 1986 list was 34.3% minority males, 33.8% White males, and 31.9% female.

The undisputed evidence is that, from June 1982 through May 1988, the City hired new police officers in a manner designed to hire Identified Group males and females in approximately the same percentages as they applied for the position. Because White males tended to score higher on the written tests and assessments used to score candidates, to the extent the tests were valid and were to be used, such a policy was favorable to Identified Group males as compared to White males. Whether it was favorable to Identified Group members overall as compared to Whites overall is not actually shown by the data because most of the data as to women is not broken down by race. A reasonable jury, however, could (but would not be required to) infer that, overall, the procedures employed favored Identified Group members. The data, however, is insufficient to determine the extent to which African-Americans and Hispanics were favored, that is, the data provides no sufficient basis for determining how many additional Identified Group members were hired because of the policy of forwarding and selecting in the specified percentages. On the other hand, a reasonable jury could also find that the data does not show Identified Group members were favored. There was no conclusive evidence presented at the Petit trial that the written tests and Assessment Center scoring was a valid and accurate predictor of who could perform well as a patrol officer, nor was evidence presented that the testing and assessments were not racially biased. Applying the percentages may have simply corrected for

biases in the evaluation procedure and thus could still have resulted in nondiscriminatory hiring. Additionally, as defendant points out, White males were still being hired at a greater rate than their representation in the applicant pool.[28] Whether this was because of (a) White males being, on average, better qualified to be patrol officers, (b) discrimination favoring White males, or (c) some other reason cannot be conclusively determined from the evidence presented at trial. On defendant's Rule 50(b) motion, though, the inferences favorable to plaintiffs must be drawn and genuine factual disputes must be resolved in plaintiffs' favor. A reasonable jury could find that patrol officer hiring from June 1982 through May 1988 was discriminatory in favor of African-Americans and Hispanics. No determination, however, could be made as to the actual effect in terms of an estimated number of additional Identified Group members hired because of the hiring policies in place.

Even taking as true that patrol officer hiring from June 1982 through May 1988 favored African-Americans and Hispanics, defendant still contends that a rational jury would still have to find that the Discriminatory Effects Interest was proven as to African-Americans. It contends that Siskin's analysis as to shortfalls at the sergeant rank cannot be undermined absent specific numbers as to the hiring effect and expert testimony as to how that would affect Siskin's analysis. As the jury was instructed at trial, though, "[t]he fact that [an expert] has given an opinion does not mean that you are

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[28] 29.8% of those taking the written test for the 1982 list were White males, whereas 34.2% of those hired from the 1982 list were White males. As to the 1986 list, 28.6% of those applying were White males (including the missing data applicants) and 31.1% of those taking the written test were White male, whereas 33.8% of those hired from the 1986 list were White males.

required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all the other evidence in the case." Jury Instr. [330] 10. Accord 7th Cir. Jury Instr. Crim. 3.07 (1999); Burroughs v. FFP Operating Partners, L.P., 28 F.3d 543, 550 (5th Cir. 1994). Where assumptions underlying an expert's analysis are undermined, it is well within the factfinder's power to reject the analysis. See In re TMI Litigation, 193 F.3d 613, 675-76 (3d Cir. 1999), amended, 199 F.3d 158 (3d Cir.), cert. denied, 530 U.S. 1225 (2000); Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc., 2002 WL 1801525 *74-75 (S.D. Ind. July 5, 2002); Community Association for Restoration of Environment v. Henry Bosma Dairy, 2001WL 1704240 *11 (E.D. Wash. Feb. 27, 2001), aff'd, ___ F.3d ___, 2002 WL 31051547 (9th Cir. Sept. 16, 2002). Statistical evidence presented by an expert is substantially undermined if the underlying data is not trustworthy because based on assumptions that do not match the evidence in the case. See McCleskey v. Kemp, 481 U.S. 279, 288 n.6 (1987).

Here, the patrol officer hiring rate for African-Americans and Hispanics in a nondiscriminatory procedure was central to Siskin's projections as to how many African-American and Hispanic sergeants there would have been from 1987 through 1991 if not for discrimination. In determining that rate, Siskin used hiring data from 1977 through 1990, which he assumed represented nondiscriminatory hiring. A reasonable jury could have found that data from half of those 14 years did not actually represent nondiscriminatory hiring, but instead represented hiring policies that favored the Identified Groups. Perhaps the numerical effect on additional Identified Group hirings was minimal so that Siskin's projections were still close, though it must be kept in mind that the projected shortfalls of Hispanic sergeants for the years 1988, 1989, and

1990 were only four. Or perhaps the analysis could have been recomputed leaving out the seven years from 1982 through 1988, but that would likely require a statistical expert to redo the analysis. On the evidence presented at trial, a reasonable jury could have rejected Siskin's analysis as being based on an assumption that was inconsistent with the evidence. Without Siskin's analysis, there is an insufficient basis for connecting the past discrimination to a continuing effect on the number of African-American sergeants from 1988 through 1991. Therefore, defendant cannot be entitled to judgment as a matter of law on its Discriminatory Effects Interest regarding Selection Preferences for African-Americans.[29]

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[29] The Reynolds case involved promotions to lieutenant in 1990 and 1991 and was one of the cases consolidated with Petit for purposes of pretrial discovery. See Reynolds, 296 F.3d at 525-26; Petit VI, 2001 WL 914457 at *7. Reynolds, 296 F.3d at 527-28, upholds findings of discrimination in hiring by the CPD for the same time periods that are at issue in the present case as well as findings of a continuing effect at the lieutenant level in the 1980's. Since, in Reynolds, the City relied on much of the same evidence of past discrimination that was presented in the Petit case and also relied on Siskin's analysis (though as directed to the effect on the lieutenant ranks), the City characterizes the Reynolds decision as "the Seventh Circuit once again ratif[ying] the legal sufficiency of the City's evidentiary presentation in Petit." Def. Motion to Submit Supplemental Authority [361] 4. The motions pending in Petit, however, must be decided on the evidence and arguments actually presented in Petit, which apparently differ from what was presented in Reynolds. To the extent the Reynolds decision lends some support to the City's position in the present case, it must be recognized that the Seventh Circuit upheld discriminatory effects findings in Reynolds; it did not direct a verdict as the City seeks in its pending Rule 50(b) motion. The Seventh Circuit specifically noted in Reynolds that "[t]he evidence that the decline [in the hiring of African-American police officers] was the result of

The issue is different as to the Discriminatory Effects Interest and the Selection Preferences for Hispanics. The jury found such an Interest existed and plaintiffs failed to properly preserve a challenge to that verdict. Therefore, it must be taken as true that the Discriminatory Effects Interest as to Hispanics was shown. However, defendant still would not be entitled to judgment as a matter of law unless a reasonable jury could only conclude that the Selection Preferences for Hispanics were narrowly tailored to that Interest. As previously discussed, a reasonable jury could find that a key assumption of Siskin's analysis was undermined. With a key assumption undermined, Siskin's projections as to the number of Hispanic sergeants there would have been absent discrimination would not represent a plausible lower-bound estimate of the shortfall. Since a reasonable jury could find that the narrow tailoring requirement is not satisfied, defendant would not be entitled to judgment as a matter of law as to the Discriminatory Effects Interest and Selection Preferences for Hispanics.

Defendant's Rule 50(b) motion will be denied.

III. SUMMARY JUDGMENT MOTIONS

A. Summary Judgment Standard

On a motion for summary judgment, the entire record is considered with all reasonable inferences drawn in favor of

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discrimination was not conclusive. . . . The conflict over this issue was one for the jury to resolve, subject to deferential review." 296 F.3d at 528. Since the evidence was not conclusive on this issue, in Reynolds, the City would not have been entitled to judgment as a matter of law regarding promotions of African-Americans and the City's discriminatory effects interest.

the nonmovant and all factual disputes resolved in favor of the nonmovant. Lesch v. Crown Cork & Seal Co., 282 F.3d 467, 471 (7th Cir. 2002); Hilt-Dyson v. City Of Chicago, 282 F.3d 456, 462 (7th Cir. 2002); Schneiker v. Fortis Insurance Co., 200 F.3d 1055, 1057 (7th Cir. 2000). The burden of establishing a lack of any genuine issue of material fact rests on the movant. Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir. 2001); Wollin v. Gondert, 192 F.3d 616, 621-22 (7th Cir. 1999). The nonmovant, however, must make a showing sufficient to establish any essential element for which he, she, or it will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Billings v. Madison Metropolitan School District, 259 F.3d 807, 812 (7th Cir. 2001). The movant need not provide affidavits or deposition testimony showing the nonexistence of such essential elements. Celotex, 477 U.S. at 324. Also, it is not sufficient to show evidence of purportedly disputed facts if those facts are not plausible in light of the entire record. See NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 236 (7th Cir.), cert. denied, 515 U.S. 1104 (1995); Covalt v. Carey Canada, Inc., 950 F.2d 481, 485 (7th Cir. 1991); Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 476-77 (7th Cir.), cert. denied, 488 U.S. 852 (1988). As the Seventh Circuit has summarized:

> The party moving for summary judgment carries the initial burden of production to identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Logan v. Commercial Union Ins. Co., 96 F.3d 971, 978 (7th Cir. 1996) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citation and internal quotation omitted)).

The moving party may discharge this burden by "'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325, 106 S. Ct. 2548. Once the moving party satisfies this burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "The nonmovant must do more, however, than demonstrate some factual disagreement between the parties; the issue must be 'material.'" Logan, 96 F.3d at 978. "Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute." Id. (citation omitted). In determining whether the nonmovant has identified a "material" issue of fact for trial, we are guided by the applicable substantive law; "[o]nly disputes that could affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." McGinn v. Burlington Northern R R. Co., 102 F.3d 295, 298 (7th Cir. 1996) (citation omitted). Furthermore, a factual dispute is "genuine" for summary judgment purposes only when there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Hence, a "metaphysical doubt" regarding the existence of a genuine fact issue is not enough to stave off summary judgment, and "the nonmovant fails to demonstrate a genuine issue for trial 'where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party . . . .'" Logan, 96 F.3d at 978

(quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

Outlaw, 259 F.3d at 837.

Defendant's motion for summary judgment will be addressed first because it need succeed on only one compelling interest to be entitled to a judgment dismissing all remaining claims. Plaintiffs must be entitled to summary judgment as to all three compelling interests in order to be entitled to a finding of liability. Plaintiffs' CBA issue is the only contention that goes to all three compelling interests.

B. Defendant's Summary Judgment Motion

1. Discriminatory Effects Interest

Defendant has provided some additional evidentiary documents that were not presented at trial, including affidavits of Joyce. None of the additional evidence, however, alters the analysis contained in the ruling on defendant's Rule 50(b) motion. See § II(c) (3), supra. Defendant is not entitled to summary judgment as to the Discriminatory Effects Interest.

2. Adverse Impact Interest

The Adverse Impact Interest is discussed in more detail regarding plaintiffs' summary judgment motion. See § III(c) (3), infra. Evidence at trial showed that African-Americans and Hispanics were promoted at rates well above that necessary to avoid violating the 80% rule. Therefore, a factfinder would not be required to find that the Score Adjustments were narrowly tailored to the Adverse Impact

Interest. Defendant is not entitled to summary judgment based on the Adverse Impact Interest.

3. Operational Need Interest

As to the Operational Need Interest, the jury was instructed:

> An interest in diversifying law enforcement personnel so as to have an effective law enforcement organization may constitute a compelling interest. For the Operational Need Interest to be compelling, for the Promotion Date, there must be sufficient evidence that (a) an important aspect of the effectiveness of the Chicago Police Department's law enforcement mission was significantly diminished by an underrepresentation of the Identified Group at the sergeant rank and (b) increasing the representation of the Identified Group at the sergeant rank was necessary to the accomplishment of an important law enforcement objective.

Jury Instr. [330] 33.

As to narrow tailoring of the Operational Need Interest, the jury was further instructed:

> In connection with narrow tailoring and the Operational Need Interest, a factor you should consider is whether the number of Identified Group members promoted to sergeant on a particular Promotion Date was a plausible lower-bound estimate of the number of members of that Identified Group that needed to be promoted to sergeant in order to

> sufficiently diversify the sergeants rank so as to accomplish an important law enforcement objective.

Id. at 37.

Consistent with the instructions given at the trial, the Seventh Circuit subsequently held that a police department's operational need for diversity in its workforce can be a compelling interest for engaging in affirmative action promotions. Reynolds, 296 F.3d at 529-30.[30] The Reynolds case involved CPD promotions to lieutenant that occurred in 1990 and 1991. See id. at 525. "Many courts . . ., including our own have at least left open a small window for forms of discrimination that are supported by compelling public safety concerns, such as affirmative action in the staffing of police departments and correctional institutions. Especially in a period of heightened public concern with the dangers posed by international terrorism, effective police work must be reckoned a national priority that justifies some sacrifice of competing interests." Id. at 530. In Reynolds, it was held that the City conclusively proved a two-fold operational need to have more Hispanics at the lieutenant rank. One was for internal operation in the supervision of employees, including setting a tone and sensitizing non-Hispanic officers. The second was an external operational need to serve as ambassadors to the community. Id. at 529-30. "The imperative need for this discrimination had to be proved and not merely conjectured. It would not have done for the City

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[30] A recent district court case from the First Circuit reaches a contrary conclusion. See Cotter v. City of Boston, 193 F. Supp 2d 323, 340-43 (D. Mass 2002). This court respectfully disagrees with this holding in Cotter and will follow this court's prior holdings and Reynolds, which is, in any event, binding in this Circuit.

merely to have presented plausible argumentation or to have appealed merely to common sense. It had to substantiate its position with evidence." Id. at 530.

In support of its Operational Need Interest in the present case, defendant points to the testimony of two experts, testimony of high-ranking CPD officials, and census data as to the City's African-American and Hispanic population.

Samuel Walker, Ph.D., testified at trial. He is a professor in the Department of Criminal Justice at the University of Nebraska, where he has taught since 1947. He has published a number of books and articles on policing, including on civil rights, race, and ethnicity in the criminal justice system. This has included research as to the employment of African-Americans and Hispanics as police officers in urban areas. Related to the present case, Walker conducted a survey as to the perceptions and attitudes of Chicago residents regarding minority employment in supervisory and command positions in the CPD.

Walker testified that there was a consensus of opinion among experts in his field that policing is a human service activity where "issues of communication, issues of trust, issues of understanding are absolutely crucial to the effectiveness of a police department." Tr. Vol. VII 20 (Jan. 28, 2002). He further testified that accreditation standards for police departments include that it reflect the diversity of the community it polices. Id. at 21-22. He testified that he did not know of a single study supporting that minority representation is unimportant, id. at 22, and that the consensus opinion in his field was that discriminatory employment practices and lack of minority officers is a problem that will impede the effectiveness of a police force, id. at 20. He also testified that, "in a typical police department, sergeants operating--field

sergeants in patrol area and actually in the criminal investigation area will be directly involved in many specific calls and contacts between citizens. . . . [A] good sergeant will back up officers in any incident where there is potentially a problem, they often will give advice instruction to officers, they will sometimes take command if it is a particularly difficult or problem situation." Id. at 23.

As to his 1996 survey of Chicago residents, the conclusions were "that the employment of minority police officers in command position matters to Chicago residents. The people we surveyed said that it is important, they said they noticed, they said that increased minority officers helps to improve the police department. Not a single one of our respondents said that the Chicago Police Department had actually got worse because of more minority employment." Id. at 19. See also id. at 23-36. He also testified that "quite a number" of respondents, both African-American and White, believed there were not enough minority officers in the command ranks. Id. at 33.[31]

Defendant also presented the testimony of Tom Potter, former Chief of Police for the City of Portland and a police consultant since 1993. He testified that diversity in the supervisory ranks of a police department is necessary to being a more effective law enforcement organization. Id. at 70.

> . . . And the reason I do is that I think the sergeant's job is not only the most significant promotion a person gets in the organization, I think

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[31] Of those who were asked this question, 45.4% said there were not enough, 24.9% said there were enough, and 29.8% did not know or did not respond. Def. Exh. 31, App. II at 12.

> it's one of the most important jobs in an organization. It's where the rubber meets the road, it's where the people, the sergeants go out there with the officers, they cover them, they mentor them, they make decisions out there in the field, and that's where most people have contact with the police, both minorities and Whites, and that that's where you can make a good impression or a bad impression, and that I found consistently that in minority communities, it worked to our advantage that we could have minority command and supervisors out in the field covering minority officers and White officers, but having greater entry into the communities, their ethnic communities that they represented.

Id. at 70-71.

Potter testified that minority sergeants increase the effectiveness of a police organization internally, by decreasing overt racism within a department, id. at 66-67, and by serving as mentors and role models for minority patrol officers, id. at 80-81. He also testified that minority sergeants increase the effectiveness of a police department through community interaction because they are often the first supervisors on a scene and recognized as such, and may have a better ability or be perceived as relating better to a particular community. Id. at 78-82. He testified that building such trust is particularly important for community policing strategies, which the CPD began implementing in the mid-1980's. Id. at 68-69. Additionally, he testified that diversity in a police force is also particularly important in cities like Chicago where there are neighborhoods with high concentrations of minorities. Id. at 75-76.

Defendant also presented the testimony of current and former CPD supervisory officials. Terry Hilliard is the current Superintendent and began as a patrol officer in 1968. Id. at 120. Gerald Cooper was a CPD patrol officer and sergeant from 1961 until 1978 and employed at the lieutenant rank as an attorney in the CPD legal department from 1985 until his retirement in 1995. Id. at 95-100. LeRoy Martin was Superintendent under three mayors from October 1987 until his retirement in April 1992. Tr. Vol. VIII at 16-17 (Jan. 29, 2002). He began as a CPD patrol officer in 1955, became a sergeant in 1965, a lieutenant in 1975, a captain in 1981, and, subsequently, a commander. Id. at 18-21. Joseph DeLopez had been a deputy superintendent for approximately two years at the time he testified. Tr. Vol. V at 115 (Jan. 23, 2002). He began as a CPD patrol officer in 1971. Id. at 117. All four testified regarding the need for minority sergeants.

Hilliard testified that sergeants have to supervise patrol officers, including training, disciplining, mentoring, and supporting; patrol officers interact with their sergeants more than any other CPD management official. Vol. VII at 132. See also id. at 183-84 (Cooper). Sergeants also have substantial interaction with the community, especially under community policing. Id. at 133. All four testified race and ethnicity played a role in police-community interactions and that the presence of minorities at the sergeant rank was important. Vol. V at 126-30, 137-41; Vol. VII at 134-35, 140-45, 182-85; Vol. VIII at 31-33. Martin and Cooper both testified about a need for minority sergeants, particularly Hispanic sergeants, at the time of the promotions at issue in the present case and that this was considered in making the promotions at issue. Vol. VII at 105-07, 182-86; Vol VIII at 24-27, 31-33, 37.

Defendant presented evidence of the increase in the percentage of African-American and Hispanic residents of the City, from 22.9% African-American and 3.1% Hispanic in 1960 to 38.6% African-American and 19.6% Hispanic in 1990. Def. Exh. 34B. See also Def. Exh. 36A, attachments 9 (at 41), 29. Defendant also presented evidence as to which neighborhoods had high concentrations of African-Americans or Hispanics as of each census from 1960 to 1990. Def. Exh. 36A, attachments 18-21, 22-24. As of December 31, 1987, the CPD had 269 (22.6%) African-American sergeants and 44 (3.7%) Hispanic sergeants. As of December 31, 1991, the numbers were 287 (23.8%) African-American sergeants and 66 (5.5%) Hispanic sergeants. Def. Exh. 28A-B. Martin, who was Superintendent in 1988, testified that, considering days off and the need to staff three shifts seven days a week, 44 Hispanic sergeants allowed for, at most, eight Hispanic sergeants to be working in the entire city on a particular shift.[32] That was not enough to provide a diverse workforce for the then four predominantly Hispanic police districts, let alone maintain diversity in other districts and at other assignments for sergeants. Vol. VIII at 31-33.

Plaintiffs point to other evidence that they contend creates at least a factual dispute as to whether the Operational Need Interest was proven to be compelling. Plaintiffs point to testimony supporting that police officers can be effective with persons of other races. However, no witness testified that only African-American officers could be effective with

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[32] Plaintiffs contend the correct amount would be about 12 per shift (6/7 of 44 divided by 3 shifts). Plaintiffs fail to take into account furlough days, vacations, illnesses, training assignments, etc. As Martin indicated in his testimony, police officers do not work in the field 6 out of 7 days for all 52 weeks of the year.

African-Americans or only Hispanic officers can be effective with Hispanics. The testimony was that having a sufficient level of minority sergeants changed the perceptions of both minority citizens and the minority patrol officers who were supervised by sergeants; it sensitized all officers to cultural issues; and it increased the possibility of having an officer available who would better be able to handle the problem. No one testified that only African-Americans should work in African-American neighborhoods, only Hispanics in Hispanic neighborhoods, and only Whites in White neighborhoods. No such finding is necessary to support a compelling interest in a need for diversity. See Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996) (that belonging to the same race as an inmate is not a requirement for effectiveness as a guard did not cast doubt on a prison's need for an African-American male lieutenant). Additionally, the fact that there are differences within the African-American community and different nationalities or other differences within the Hispanic community, does not undermine the testimony as to a need for diversity. Neither does it matter, as plaintiffs assert, whether particular Hispanic sergeants have the ability to speak Spanish. See Reynolds, 296 F.3d at 530.

Plaintiffs contend that Potter's testimony may be disregarded because he did not rely on an actual study and was unfamiliar with Chicago. Potter's credentials were established and plaintiffs did not present any expert of their own who disputed Potter's or Walker's testimony as to a police department's need for diversity. Potter's minimal assumptions as to Chicago, that it had neighborhoods with high concentrations of minorities and that it was using community policing techniques, were both supported by uncontroverted evidence. No basis in the evidence existed for rejecting Potter's and Walker's testimony as to a police department's internal and external needs for diversity.

Plaintiffs now question the validity of Walker's survey based on the number of nonresponses. Walker, however, testified the survey had sufficient respondents. Vol. VII at 27-29. See Def. Exh. 31 at 12-13. Plaintiffs did not question Walker about this nor did they present their own expert to raise questions as to the survey's validity or reliability. Walker's testimony as to the adequacy of the survey's methodology must be accepted since uncontested. Moreover, even if the survey were to be completely disregarded, it is not essential to finding a compelling interest.

Apparently taking Walker's survey as valid, plaintiffs also contend that it supports that diversity at the sergeant level is not important to the public because only 18.5% of those surveyed had had contact with a command officer. Def. Exh. 31 at 20, App. II at 14. Plaintiff, however, ignores that 9.1% had said they had contact within the previous year. Id., Vol. VII at 42-43. Walker testified that national surveys had shown that 20% of people have contact with any police officer during a year. Id. at 41-42. Thus, evidence supports that a substantial percentage of those who actually have contact with the police have contact with a command officer.

Plaintiffs also point to the facts that a majority of those surveyed who had contact with a command officer had contact with a White officer (56.7%), Def. Exh. 31, App. II at 14, and that, of all those who had contact, 80.5% were satisfied with the contact, id. at 15. First, no breakdown is provided as to whether satisfaction rates differed based on the races of the command officers, the races of the respondents, and a combination thereof. In any event, even if citizens are generally satisfied with the conduct of command officers, that does not mean that the presence of minority sergeants cannot contribute substantially to an improvement in police effectiveness.

Defendant presented substantial evidence establishing the Operational Need Interest, both as to internal supervision needs and external community contact needs. Plaintiffs did not present any evidence raising any significant issue as to defendant's Operational Need Interest. A reasonable trier of fact could only find that the Operational Need Interest existed from 1987 through 1991. Cf. Reynolds, 296 F.3d at 529-30. There is no genuine factual dispute as to this issue.

However, it still must be considered whether there is no genuine factual dispute as to the Selection Preferences being narrowly tailored to the Operational Need Interest. Martin's testimony that 44 Hispanic sergeants was not adequate (for diversity purposes) to cover districts with high concentrations of Hispanics as well as other districts and assignments is uncontested.[33] After implementing the Selection Preferences at issue in the present case, there were 66 Hispanic sergeants, a 50% increase. That would allow for approximately 12 Hispanic sergeants per shift. The only reasonable inference from Martin's uncontested testimony would be that that amount is still not enough to serve all of the CPD's operational needs regarding Hispanic sergeants. Therefore, the Selection Preferences did not result in an increase of Hispanic sergeants that exceeded the plausible lower-bound

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[33] Contrary to plaintiffs' assumption, the Operational Need Interest is not satisfied by assigning every single Hispanic sergeant to one of the police districts with high concentrations of Hispanic residents. That would not satisfy the interest in having some level of diversity throughout the police force, it would not allow Hispanic sergeants to take on other assignments that may aid in their advancement to higher positions, and it would be a partial return to the days of segregating the police force by the community being served.

estimate of the shortfall that needed to be overcome in order to serve defendant's compelling Operational Need Interest.

As to the years and promotions at issue in this case, the uncontested facts support both that (a) there was a compelling Operational Need Interest for increasing the number of Hispanic sergeants and (b) the Selection Preferences for Hispanic sergeants that were imposed were narrowly tailored.

The evidence as to African-American sergeants is different. Unlike Martin's testimony as to Hispanic sergeants, there is no evidence specifically addressing the number of African-American sergeants and spreading them out among the various police districts. While Walker and Potter testified about a need for diversity, they did not testify as to a particular number, percentage, or ratio that would be necessary to satisfy that need. Cooper testified that, during the pertinent time period, the feedback he received from community members was that the CPD did not have an adequate representation of African-American sergeants. See Vol. VII at 105-07, 184. He also testified that he believed more African-American sergeants were needed to serve the CPD's operational needs. Id. at 182-86. Martin also testified that more African-American sergeants were needed to serve the CPD's operational needs. Id. at 37. Plaintiffs did not present any expert or CPD official who testified that there were already a sufficient number of African-American sergeants to serve the CPD's operational needs nor do they presently provide additional, nontrial evidence to that effect. The cross-examination of Cooper and Martin also raised no genuine dispute as to their testimony of a need for more African-American sergeants. Therefore, on summary judgment, it must be taken as true that the CPD's operational needs required more African-American sergeants.

Neither Cooper nor Martin specified exactly how many more African-American sergeants were needed to serve this need. Regarding internal operational needs, though, Martin referred to a need to have a sergeant rank that, in terms of race, reasonably represented the patrol ranks. Id. at 27. However, as to the percentage of African-Americans at the patrol officer and sergeant ranks, parity had essentially been achieved prior to the promotions at issue, see Def. Exh. 22; Petit V, 2001 WL 629306 at *11 & n.17, and therefore, as to internal operational need, parity alone could not be a justification for a Selection Preference favoring the promotion of African-Americans to sergeant nor a lower-bound estimate of the promotions necessary to satisfy that need.

Defendant points to the African-American population of the City as compared to the percentage of African-Americans at the sergeant rank. However, no evidence before the court establishes a particular ratio between minority resident population in the City and minorities in the sergeant rank that is minimally necessary to serve external operational needs.

As of December 31, 1987, the CPD had 269 African-American sergeants, which was 22.6% of sergeants. Def. Exh. 28A. As of December 31, 1991, that is after the promotions at issue had all been made, there were 287 African-American sergeants, which was 23.8% of sergeants. Def. Exh. 28B. There is uncontroverted evidence that the 269 African-American sergeants as of the end of 1987 were insufficient to serve the CPD's operational needs. By the end of the promotions at issue, the absolute number of African-American sergeants had only increased by 18. Because the overall number of sergeants had also increased (from 1191 to 1208, see Def. Exh. 28A-B), the difference in the percentage of African-American sergeants was 1.2%. Stated another way, had the total number of sergeants stayed at 1191, there

would have had to have been 14 more African-American sergeants for 23.8%. Viewed as a percentage of White sergeants, 14 is 1.6% of the 876 White sergeants employed as of the end of 1987 and 18 is 2.1% of the 855 White sergeants employed as of the end of 1991. See Def. Exh. 28A-B. The increases in the number of African-American sergeants (and corresponding decreases in the number of White sergeants) were so minimal that a reasonable finder of fact could only find that the promotions of African-American sergeants was well within a lower-bound estimate of the number necessary to overcome the uncontroverted shortfall in the number of African-American sergeants needed to serve the CPD's operational needs. Compare Reynolds, 296 F.3d at 530-31.

In addition to keeping the promotions to a plausible lower-bound estimate of that necessary to serve the CPD's external operational needs, the promotions were otherwise narrowly tailored. The additional identified group members that were promoted had all qualified under the Examination and had scored within two points of the lowest scoring White officer who was promoted, which was within the Examination's standard measurement of error. Cf. Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13, 24 (1st Cir. 1998). The Selection Preferences were used for only a three-year period and there is no evidence of an efficacious alterative that would have had less of an impact on White candidates. The effect on many or most of the remaining plaintiffs was a delayed promotion to sergeant, not a complete exclusion from that position, nor any loss of an existing position. Cf. Majeske, 218 F.3d at 824; Cotter, 193 F. Supp. 2d at 354. Additionally, the decrease in the percentage of White sergeants was not large, from 73.7% on December 31, 1987 to 70.7% as of December 31, 1991. See Def. Exh. 28A-B. The only reasonable conclusion based on the undisputed evidence is that narrow tailoring was satisfied.

Defendant satisfied its burden of production as to narrow tailoring, thereby placing the burden of persuasion on plaintiffs. Cf. Petit V, 2001 WL 629306 at *10. Therefore, to defeat summary judgment as to this issue, plaintiffs must present sufficient evidence from which it could be found that narrow tailoring was not satisfied. Plaintiffs did not directly dispute, or point to sufficient contrary evidence, that narrow tailoring was not satisfied for the promotion of African-Americans. Thus, plaintiffs do not show the existence of a genuine factual dispute meriting another trial on this issue. The Selection Preferences for African-American sergeants were narrowly tailored to defendant's Operational Need Interest.

Resolving all genuine factual disputes and drawing all reasonable inferences in plaintiffs' favor, it can only be found and held that, from 1988 through 1991, a compelling Operational Need Interest existed for promoting African-Americans and Hispanics to sergeant and the Selection Preferences employed were narrowly tailored. Defendant is therefore entitled to summary judgment dismissing all remaining claims of plaintiffs.[34] As was previously indicated, see § I, supra, all aspects of plaintiffs' summary judgment will still be addressed.

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[34] If plaintiffs could show that the CBA precludes the possibility of defendant having any compelling interest in racially preferenced promotions, defendant would not be entitled to a judgment. As is discussed in § III(c) (1), infra, plaintiffs' CBA contentions are without merit.

C. Plaintiffs' Summary Judgment Motion

1. The CBA

Uncontested evidence establishes that the CBA in effect from February 7, 1990 through December 31, 1991, provided in part:

> **Section 10.1 Equal Employment Opportunity**
>
> The Employer will continue to provide equal employment opportunity for all officers, and develop and apply equal employment practices.
>
> **Section 10.2 Non-Discrimination**
>
> The Employer shall not discriminate against officers, and employment-related decisions will be based on qualifications and predicted performance in a given position without regard to race, color, sex, religion, age (40-63), or national origin of the officer. . . . Officers shall not be transferred, assigned or reassigned for reasons prohibited by this Section 10.2.

As is discussed in § II(B) (2), supra, there is no evidence as to the CBA provisions that may have been in effect when the Examination was being prepared and scored and also when the first set of promotions were made in December 1988. Therefore, plaintiffs' contention as to the CBA could only apply to the promotions made on the last four Promotion Dates.

Defendant contends the cited clauses are inapplicable to the promotions at issue because sergeants were not members of the bargaining unit and promotions to positions outside the

bargaining unit are not covered by the CBA. Defendant cites to a 1998 arbitration decision to that effect, see Sergeant Promotion Examination Grievance 129-97-015 (Arbitrator Cox May 11, 1998) ([351] Exh. 1), and contends this "court" is bound to follow the arbitration decision. The arbitration, however, concerned the 1995 labor agreement that was in effect in 1997. Even if the pertinent contract language is the same as that in the CBA,[35] a construction of the 1995 Agreement would not necessarily be a binding construction of the 1990 CBA. More importantly, unlike the cases cited by defendant (see United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960); Rose v. Bridgeport Brass Co., 487 F.2d 804, 811 (7th Cir. 1973)), which found parties, not the court, bound by prior arbitration decisions, defendant does not contend that any of the remaining plaintiffs were parties to the arbitration through their representative, the FOP. Even if not binding on any plaintiffs, the Arbitration Decision contains persuasive reasoning.

Notwithstand language in § 23.3 of the 1995 Agreement requiring that seniority be considered for promotions, the Arbitrator followed other arbitration decisions holding that a collective bargaining agreement generally does not apply to promotions outside the bargaining unit covered by the agreement. Arb. Dec. at 4 & n.2. The Arbitrator described this principle as being well settled in other jurisdictions and followed in Illinois. See id. at 6 (citing Village of Franklin

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[35] The Arbitration Decision quotes a portion of Section 10 of the 1995 Agreement that is identical to § 10.1 of the CBA. The Arbitration Decision also refers to a § 10.2, but does not quote or paraphrase any portion of that section's language. The Arbitration Decision also quotes § 23.3 of the 1995 Agreement, which is identical to § 23.3 of the CBA.

Park v. Illinois State Labor Relations Board, 265 Ill. App. 3d 997, 638 N.E.2d 1144, 1148-49 (1st Dist.), appeal denied, 157 Ill. 2d 498, 642 N.E.2d 1277 (1994)). See also Oney v. Kansas City Southern Railway Co., 3 F. Supp. 2d 729, 731 (E.D. Tex. 1997). This reasoning applies to the language contained in the CBA.

Plaintiffs cite § 23.3 of the CBA which provides: "Seniority shall be considered in the promotion of officers covered by this Agreement. In considering officers for promotion, seniority shall in competitive testing, be utilized as a tiebreaker." Plaintiffs contend this shows the CBA applies to all promotions. There are, however, promotions within the bargaining unit, e.g., promotions to detective. Moreover, § 4 of the CBA provides that the City retains the right to "operate and manage its affairs in each and every respect," specifically including promoting officers, unless "expressly" provided otherwise in the CBA. There is no express provision applying the non-discrimination clause to promotions outside the bargaining unit. Therefore, the general rule prevails that a labor contract does not apply to positions outside the bargaining unit. See Oney, 3 F. Supp. 2d at 731-32.

It could not have been a breach of § 10.1 or § 10.2 of the CBA for the CPD to consider race in promotions to the nonbargaining unit position of sergeant. Since the underlying contention is without merit, it is unnecessary to consider whether such a breach would otherwise preclude the possibility of an overriding compelling interest.

Plaintiffs' contentions as to the CBA are no basis for granting them summary judgment nor do they involve any genuine factual disputes that preclude granting summary

judgment to defendant based on defendant's Operational Need Interest.

2. Discriminatory Effects Interest

As is discussed in § II (c) (3), supra, it must be taken as true that, as of 1987 through 1991, a compelling interest existed in remedying the lingering discriminatory effect at the sergeant rank of discrimination against Hispanics. As to the lingering effect on having African-American sergeants (as well as narrow tailoring regarding both Hispanics and African-Americans), a factual dispute exists as to the underlying assumptions of Siskin's analysis. That dispute precludes granting judgment as a matter of law or summary judgment for defendant based on the Discriminatory Effects Interest. See §§ II(c) (3), III(B) (1), supra. As is discussed in § II(c) (3), supra, the evidence also is not conclusive that Siskin's underlying assumption as to the years of nondiscriminatory hiring was incorrect. Therefore, on plaintiffs' summary judgment motion, Siskin's assumption must be taken as true and plaintiffs would not be entitled to summary judgment based on that contention. Plaintiffs, however, also raise additional contentions regarding the Discriminatory Effects Interest that were not considered in the discussion of defendant's motions. Those issues will be addressed herein.

Plaintiffs contend that Siskin's analysis must be rejected because it relies on the incorrect assumption that the CPD's qualifications for hiring did not change during the years under consideration in his analysis. See Tr. Vol. VI at 155-56 (Jan. 24, 2002). Plaintiffs point to evidence that a high school education requirement was imposed in 1975, the citizenship requirement was changed to lawful resident in 1975, a psychological test was added in 1981, and a drug screen was

instituted in 1985. Plaintiffs, however, point to no evidence showing that any of these changes resulted in more African-Americans or Hispanics being hired than would have been the case without the changes. As Siskin testified, failing to take the changes into account may have understated the shortfall or the effects may have been a wash. Id. at 156-58. Plaintiffs do not present conclusive evidence that Siskin's analysis overstates the shortfall of African-Americans or Hispanics because the analysis fails to consider changes in qualification criteria. Cf. Petit V, 2001 WL 629306 at *10.

Even accepting Siskin's analysis as true, plaintiffs contend narrow tailoring is not satisfied. One of plaintiffs' contentions is that African-American males were overrepresented. This contention was previously addressed and rejected on summary judgment. See id. at *11. Plaintiffs also contend that narrow tailoring was not satisfied because African-Americans and Hispanics were no longer underrepresented at the sergeant rank in that their representation at that rank was within reasonable parity of their representation at the patrol officer rank. That argument was also rejected on summary judgment. Parity within ranks is not the proper measure of a discriminatory effects shortfall. See id.

On plaintiffs' summary judgment motion, resolving all genuine factual disputes and drawing all reasonable inferences in defendant's favor, it must be taken as true that the Discriminatory Effects Interest exists for both African-Americans and Hispanics. Siskin's analysis and his projected shortfalls also must be taken as true. Taking the shortfalls as true, the Selection Preferences were narrowly tailored. See id. at *9-12. Plaintiffs would not be entitled to summary judgment as to the Discriminatory Effects Interest.

3. Adverse Impact Interest

Prior to trial, it was held that the Adverse Impact Interest was a possible compelling interest. See Petit IX, 2001 WL 10481 at *3; Petit II, 31 F. Supp. 2d at 613-%4. See also Cotter, 193 F. Supp. 2d at 347-51; Boston Police, 147 F.3d at 21. This Interest is only claimed to justify the Score Adjustments; it is not contended to be a justification for the Out-of-Rank Promotions of Hispanics.

As to the Adverse Impact Interest, the jury was instructed:

> Title VII is a federal statute that prohibits discrimination in employment based on a person's race or national origin. In addition to prohibiting intentional discrimination, Title VII prohibits certain employment practices that have an adverse impact on a racial or ethnic group, such as African-Americans or Hispanics. Defendant's claimed Adverse Impact Interest is based on its contention that it had a compelling interest in avoiding a violation of the adverse impact provisions of Title VII.
>
> For the Adverse Impact Interest to be compelling, there must be sufficient evidence of (a) a substantial likelihood that not applying Score Adjustments would result in an adverse impact violation of Title VII and (b) no reasonable alternative to Score Adjustments, such as using a different examination or selection method or validating the 1985-88 Examination within a reasonable period of time before it was necessary to make promotions to the rank of sergeant.

Jury Instr. [330] 30.

The jury was also instructed as to certain Title VII terms that were used at trial including, employment practice, selection rate, adverse impact, and validating a promotional examination. See id. at 31-32. As to adverse impact, the jury was instructed: "An employment practice generally has an 'adverse impact' when the selection rate of one racial or ethnic group is less than four-fifths (4/5) or 80% of the selection rate of the racial or ethnic group with the highest selection rate." Id. at 31. See 29 C.F.R. § 1607.4(D); Fickling v. New York State Department of Civil Service, 909 F. Supp. 185, 188-89 (S.D.N.Y. 1995). See also Boston Police, 147 F.3d at 21 (80% rule may be a benchmark against which to gauge efforts to remedy past discrimination).

As to narrow tailoring of the Adverse Impact Interest, the jury was instructed:

> In connection with narrow tailoring and the Adverse Impact Interest, a factor you should consider is whether the number of Identified Group members promoted to sergeant on a particular Promotion Date was a plausible lower-bound estimate of the number of members of that Identified Group that needed to be promoted to sergeant in order to avoid an adverse impact violation as of that particular Promotion Date.

Id. at 37.

Plaintiffs contend they are entitled to summary judgment because, even assuming a compelling interest has been adequately proven, the evidence before the court cannot support that the Selection Preferences were narrowly tailored to the Adverse Impact Interest. One of plaintiffs' contentions is that defendant did not attempt the alternative of avoiding an adverse impact violation by validating the Examination.

However, testimony supports that there was a need for sergeants and the CPD did not want to delay hiring while attempting to create a validated examination. Compare Billish v. City of Chicago, 989 F.2d 890, 894-95 (7th Cir.), cert. denied, 510 U.S. 908 (1993) (no evidence of urgent need to promote firefighter captains that might justifyracially adjusting test results). On plaintiffs' summary judgment motion, this testimony must be taken as true.

Plaintiffs' other ground for contending narrow tailoring cannot be satisfied is that the promotions went well beyond avoiding a violation of the 80% Rule. Defendant could have avoided an adverse impact violation by adjusting the scoring so that, out of the top 500 persons they expected to hire, African-Americans and Hispanics were included at approximately 80% of the rate that Whites were included. Instead, the City attempted to adjust the scores so that each racial group would have essentially the same selection rate.

At the time defendant was racially standardizing the Examination, it expected to promote 500 patrol officers to sergeant. Assuming 500 patrol officers were to be promoted, the distribution would have to be as follows to promote African-Americans and Hispanics at approximately 80% of the White selection rate.

Race	Candidates	Promoted	Selection Rate	80% of White Rate
White	2274	358	15.74%	12.59%
Afric.	931	118	12.67%	
Hisp.	192	24	12.50%	
All	3397	500	14.72%	

Instead of setting this distribution as its goal, defendant aimed for an equivalent selection rate for each racial category, that is, African-Americans and Hispanics being selected at 100% of the selection rate of Whites. Promoting the first 500 off the racially standardized list (Def. Exh. 40), the promotion distribution[36] would have been as follows:

Race	Candidates	Promoted	Selection Rate	80% of Rate
White	2274	331	14.56%	11.65%
Afric.	931	137	14.72%	11.77%
Hisp.	192	32	15.63%	12.50%
All	3397	500	14.72%	

[36] Since this computation is meant to represent a projection made when the list was finalized in 1988, it probably would not have been known that some officers would subsequently resign or be discharged. Therefore, persons who resigned or were discharged before being promoted are included in both the candidate and promoted pool.

If the racially standardized list had been strictly followed for 500 promotions, there would not have been a violation of the 80% benchmark. However, substantially more African-Americans and Hispanics would have been promoted than was necessary to avoid their being selected at less than 80% of the White selection rate. Identified Group applicants would have been selected at a slightly higher rate than Whites, not near the 80% benchmark for avoiding a possible adverse impact violation.

Looking to the patrol officers actually promoted, the numbers are even further beyond avoiding falling below the 80% benchmark. The 458 actually promoted were as follows:

Race	Candidates	Promoted	Selection Rate
White	2274	298	13.10%
Afric.	931	119	12.78%
Hisp.	192	41	21.35%
All	3397	458	13.48%

80% of the 13.10% White selection rate is 10.48%. African-Americans and Hispanics were promoted well above that rate. A 10.48% selection rate for African-Americans would be 98 promotions and for Hispanics it would be 20. As the promotions actually occurred, African-Americans and Whites were selected at less than 80% of the Hispanic selection rate (17.08%).

Defendant does not contend that the Adverse Impact Interest justified the Out-of-Rank promotions of Hispanics. Even if those candidates and promotions are excluded from

consideration,[37] the 402 promoted were as follows:

Race	Candidates	Promoted	Selection Rate
White	2252	276	12.26%
Afric.	921	109	11.83%
Hisp.	168	17	10.12%
All	3341	402	12.03%

80% of the White selection rate is 9.80%. A 9.80% selection rate for African Americans would result in 90 promotions and a 9.80% selection rate for Hispanics would result in 16 promotions (16.46 to be precise). Although, Hispanics hired directly from the racially standardized list were at approximately 80% of the White selection rate, it cannot be ignored that, at the same time, an additional 24 Hispanics were being promoted Out-of-Rank, some of whom would have otherwise been prompted based on the racially standardized list. Cf. Billish, 989 F.2d at 895 (combination of racially standardizing examination results and out-of-rank promotions not justified).

If there had been no Out-of-Rank Promotions and, instead, the first 458 candidates on the racially standardized

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[37] The Out-of-Rank promotions of Hispanics and females were still done based on the racially standardized results, just that non-Hispanics or males were skipped. Also, the below stated numbers do not take into account that some of the recipients of Out-of-Rank promotions would have otherwise been promoted on a later Promotion Date based on the racially standardized list. Thus the number of Hispanic promotions is skewed downward.

list had been promoted, the distribution would have been as follows:[38]

Race	Candidates	Promoted	Selection Rate	80% of Rate
White	2271	304	13.39%	10.71%
Afric.	928	124	13.36%	10.66%
Hisp.	192	30	15.63%	12.50%
All	3391	458	13.51%	

If the racially standardized list had been strictly followed for 458 promotions, there would not have been a violation of the 80% benchmark. However, more African-Americans and Hispanics would have been hired than would be necessary to avoid a violation of the 80% benchmark. A 10.71% selection rate for African-Americans would be 99 promotions and for Hispanics would be 21 promotions.

Under the above analyses, it is clear that African-Americans and Hispanics were promoted at rates significantly above the 80% benchmark used in adverse impact analysis and defendant does not contend otherwise. Defendant

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[38] Because six patrol officers were eliminated for other reasons (resignations or discharge prior to a Promotion Date), this requires going to rank 464. Those six (three African-American males, three White males) have also been eliminated from the candidate pool for this computation. After rank 464, the patrol officers actually promoted were ten White females, two African-American females, and 11 Hispanic males. If the racially standardized list had been strictly followed, instead 16 White males and seven African-American males would have been promoted.

concedes that undisputed evidence shows that the Score Adjustments resulted in the promotion of African-Americans and Hispanics at a rate significantly above that necessary to avoid an adverse impact violation. Defendant, though, contends this is appropriate because, when there is a violation, it is appropriate to provide full relief. That contention relies on two unfounded assumptions. First, it assumes that a violation is being remedied. That is not true of the Adverse Impact Interest. The purpose behind this Interest is to avoid a benchmark violation, not remedy a violation that has already occurred. It only takes an 80% selection rate to avoid violating the benchmark and narrow tailoring required that the CPD aim for a plausible lower-bound estimate of that necessary to avoid the violation. But even assuming the CPD was permitted to aim for the so-called full remedy, the second unfounded assumption is that an appropriate remedy is that each racial group have the same selection rate. There is, however, no evidence that each racial group would have been selected at the same rate had the CPD been able to develop a valid promotional examination.[39] See Billish, 989 F.2d at 896 (quoting United States v. City of Chicago, 870 F.2d at 1256, 1261 (7th Cir. 1989)) ("There is no iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all fields of human endeavor."); Middleton, 92 F.3d at 408 (same). It cannot be assumed that what the City did was simply provide a full remedy for the statutory violation it otherwise expected to commit.

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[39] If that proposition were true, then, arguably, the Score Adjustments were not discriminatory because they simply reflected the results of a nondiscriminatory selection process. Defendant has never contended it can prove such a contention.

Defendant's other contention is that it was not feasible to adjust scores in a manner designed to satisfy the 80% Rule and that any such "partial standardization" would be a "half-hearted remedy" and not "principled." Def. Response [350] at 24 n.23. But just as scores can be given a standard distribution to produce the same results for different tests and different racial groups, it should be feasible to adjust them so that groups have success in different ratios. See, e.g., Billlish, 989 F.2d at 895 (test results adjusted so that minority selection rate was 84% of White selection rate). Moreover, it is no less principled to adjust to an arbitrary 80% selection rate than it is to adjust to an arbitrary 100% selection rate. If an adjustment to the 80% rate is unprincipled, then the Adverse Impact Interest that is primarily measured by that rate cannot be a principled compelling interest.

Regardless of whether adjusting to an 80% rate can be feasible or principled, the law is clear that affirmative action imposed based on a compelling interest must be narrowly tailored to that interest, which means limiting any preferences to a plausible lower-bound estimate of what is needed to serve the compelling interest. If avoiding an adverse impact violation constitutes a compelling interest, it must be narrowly tailored to avoiding a violation of the 80% Rule. See Cotter, 193 F. Supp. 2d at 352. In this case, defendant did not narrowly tailor its remedy to that objective. Therefore, plaintiffs would be entitled to summary judgment as to the Adverse Impact Interest.

4. OperationalNeed Interest

Defendant is entitled to summary judgment based on the Operational Need Interest. Therefore, plaintiffs cannot be entitled to summary judgment on this Interest.

IV. CONCLUSION

Defendant is entitled to summary judgment in its favor based on the OperationalNeed Interest. Therefore, judgment will be entered dismissing the remaining claims in this case. Alternatively, if this decision were to be overturned, the case would be subject to being retried, but limited to defendant raising the Operational Need Interest and Discriminatory Effects Interest. Also, at any retrial, the jury would have to be instructed that a Discriminatory Effects Interest as to Hispanics is already established.

IT IS THEREFORE ORDERED that the cause of action of plaintiff Stanley Surdej (deceased) is dismissed without prejudice. Defendant's motion for entry of judgment as a matter of law [335] is denied. Defendant's motion for summary judgment is granted. Plaintiffs' motion for judgment as a matter of law (treated in part as a motion for summary judgment) [336] is denied. The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiffs denying plaintiffs' causes of action with prejudice except that the following are dismissed without prejudice (a) plaintiff Stanley Surdej's cause of action, (b) plaintiff Lodge 7 of the Fraternal Order of Police's cause of action, and (c) prayers for injunctive relief.

ENTER:

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

DATED: October 23, 2002

APPENDIX E

United States District Court
Northern District of Illinois
Eastern Division

Case Number: 90 C 4984

[Filed October 24, 2002]

ROBERT PETIT, et al.	)
	)
v.	)
	)
CITY OF CHICAGO, et al.	)
	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the cause of action of plaintiff Stanley Surdej (deceased) is dismissed without prejudice. Defendant's motion for entry of judgment as a matter of law is denied. Defendant's motion for summary judgment is granted. Plaintiffs' motion for judgment as a matter of law (treated in part as a motion for summary judgment) is denied. Judgment is entered in favor of defendants and against plaintiffs denying plaintiffs' causes of

action with prejudice except that the following are dismissed without prejudice (a) plaintiff Stanley Surdej's cause of action, (b) plaintiff Lodge 7 of the Fraternal Order of Police's cause of action, and (c) prayers for injunctive relief.

Michael W. Dobbins, Clerk of Court

Date: 10/23/2002 /s/_____

Carol Wing, Deputy Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 4984, No. 90 C 0950

[Filed May 24, 2001]

ROBERT PETIT, et al.,)
Plaintiffs,)
)
v.)
)
CITY OF CHICAGO,)
a municipal corporation,)
Defendant.)
----------)
ANN ERWIN, et al.,)
Plaintiffs,)
)
v.)
)
CITY OF CHICAGO,)
a municipal corporation,)
Defendant.)
)
)

MEMORANDUM OPINION AND ORDER

***

II. DEFENDANT'S SUMMARY JUDGMENT MOTION

Undisputed facts show that, even absent racial preferences, 244 of the *Petit* plaintiffs either would not have been promoted to sergeant during the 1988-91 time period or would not have been promoted any earlier than they actually received the promotion. *See Petit II*, 31 F. Supp. 2d at 609. In *Petit II*, it was held that these 244 plaintiffs still had standing to pursue nominal damages and damages for emotional injury. 31 F. Supp. 2d at 610-13.[8] Defendant now moves for summary judgment to dismiss the remaining aspects of these plaintiffs' claims on the ground that *Texas v. Lesage*, 120 S. Ct. 467 (1999), which was decided after *Petit II*, holds that a plaintiff who would have been denied a benefit even absent discriminatory consideration has no cognizable 1983 damages claim based on past conduct.[9]

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[8] Prior to the reassignment of *Erwin*, a contrary conclusion was reached regarding the *Erwin* plaintiffs whose attempts at promotion were unaffected by the racial standardization of the 1997 lieutenant examination. *See Erwin v. City of Chicago*, 1998 WL 704295 (N.D. Ill. Sept. 30, 1998). The claims of 187 out of 190 Erwin plaintiffs were dismissed on the ground of lack of standing. For the same reasons that the claims of the 244 *Petit* plaintiffs will be dismissed, the claims of the 187 *Erwin* plaintiffs would be dismissed on the merits even if they actually do have standing.

[9] *Lesage*, 120 S. Ct. at 468-69, distinguishes claims for prospective relief. It has already been held, however, that the 244 plaintiffs' claims for injunctive relief are moot. *Petit II*, 31 F. Supp. 2d at 614.

In *Lesage*, the plaintiff complained that race-conscious criteria were used in determining admission to a Ph.D. program. Lesage sought money damages and injunctive relief. The undisputed facts on summary judgment were that Lesage would not have been admitted to the Ph.D. program even if racial considerations had not been employed. As to Lesage's § 1983 claim, the Supreme Court held:

> . . . even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless *defeat liability* by demonstrating it would have made the same decision absent the forbidden consideration. . . . Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle is the same: The government can *avoid liability* by proving that it would have made the same decision without the impermissible motive.
>
> Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is *no cognizable injury* warranting relief under § 1983.

Lesage, 120 S. Ct. at 468 (emphasis added).

One appellate court opinion has noted that *Lesage* did not expressly consider the possibility of nominal damages nor did it expressly consider whether emotional damages would be distinguishable from backpay or lost income from not being admitted to a Ph.D. program. *See Thigpen v. Bibb County,*

Ga., Sheriff's Department, 223 F.3d 1231, 1242 n.17 (11th Cir. 2000). *Thigpen*, however, did not decide the question of whether nominal and emotional damages are distinguishable. Some cases subsequent to *Lesage* have continued to permit nominal or other damages despite the fact that the same decision would have been reached even absent an impermissible criterion. *See, e.g., Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000); *Hiller v. County of Suffolk*, 199 F.R.D. 101, 104 (E.D.N.Y. 2001). These cases, however, do not consider the impact of *Lesage*. No post-*Lesage* Seventh Circuit case has been found which considers whether nominal or emotional damages are appropriate in "same-decision" situations.

One district court case did expressly consider the application of *Lesage* for a nominal damages claim. It held *Lesage* precludes such damages when the government entity would have made the same decision regardless of any race-conscious criterion and that, for the same reason, such a plaintiff lacks standing. *See Tracy v. Board of Regents of the University System of Ga.*, 2000 WL 1123268 *9-10 (S.D. Ga. June 16, 2000), *reconsideration denied*, 2000 WL 1521555 (S.D. Ga. July 24, 2000), *aff'd in part, rev'd in part sub. nom., Wooden v. Board of Regents of University System of Ga.*, __ F.3d__ 2001 WL 396705 (11th Cir. April 19, 2001). On appeal, the Eleventh Circuit reversed the holding as to standing, but left open the question of whether such a plaintiff could succeed on the merits or be entitled to any damages. *Wooden*, 2001 WL 396705 at *10-17. Applied to damages, *Tracy's* holding is consistent with *Lesage*'s clear language that showing the same decision would have been reached regardless of improper criterion "avoids" or "defeats" liability and leaves the plaintiff with "no cognizable injury." *Lesage*, 120 S. Ct. at 468. *See also* Sheldon Nahmod, *Mt. Healthy & Causation-In-Fact: The Court Still Doesn't Get It!*,

51 Mercer L. Rev. 603, 608, 618-19 (2000); Christina B. Whitman, *An Essay on Texas v. Lesage*, 51 Mercer L. Rev. 621, 624, 636 (2000). Although *Lesage* is arguably inconsistent with prior precedents, particularly *Carey v. Piphus*, 435 U.S. 247 (1978), *see Tracy*, 2000 WL 1123268 at *9; Nahmod, 51 Mercer L. Rev. at 617-18; Whitman, 51 Mercer L. Rev. at 632-33, 635,[10] *Lesage* is the Supreme Court's most recent statement and it plainly states that the "same-decision" defense goes to liability, not just specific types of compensatory damages. Following *Lesage*, the claims of the 244 plaintiffs will now be dismissed in their entirety.[11]

* * *

IT IS THEREFORE ORDERED that:

(1) Defendant's motion to clarify prior collateral estoppel ruling [0-1/273-1] is denied.

(2) Defendant's motion to apply the collateral estoppel ruling in *Erwin* [271-1] is granted.

(3) Plaintiffs' motion for Rule II sanctions and a hearing on the motion [279-1,2] is denied.

(4) Defendant's renewed motion for partial summary judgment [0-1/270-1] is granted. The claims of the 244 *Petit* plaintiffs whose promotions were not affected by racial standardization are dismissed in their entirety.

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[10] Whitman also offers a possible basis for reconciling *Lesage* with prior precedents and leaving open the possibility of nominal or other damages. *See* Whitman, 51 Mercer L. Rev. at 625, 632-36.

[11] No Rule 54(b) judgment will be entered at this time. Judgment as to the 244 *Petit* plaintiffs will be entered when the claims of the remaining plaintiffs are resolved.

(5) Plaintiffs' motion for partial summary judgment on the issue of narrow tailoring [252-1] is denied.

(6) Joint motion to trifurcate trial [0-1/269-1] is denied without prejudice.

(7) Status hearing set for June 13, 2001 at 11:30 a.m. In open court on July II, 2001 at 11:00 a.m., the parties shall submit an original and one copy of a final pretrial order in full compliance with Local Rule 16.1 and Local Rule Form 16.1.1.

ENTER:

/s/_____
UNITED STATES DISTRICT JUDGE

DATED: MAY 24, 2001

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 90 C 4984

[Dated February 2, 1999]

ROBERT PETIT, et al.,)
Plaintiffs,)
)
v.)
)
CITY OF CHICAGO,)
Defendant.)
)

MEMORANDUM OPINION AND ORDER

This lawsuit concerns the Chicago, Illinois Police Department's 1985-1988 sergeant promotional examination (the "1985-88 examination") that produced an eligibility list used between December 1988 and September 1991 in promoting 458 patrol officers to the rank of sergeant. The plaintiffs in this case are 326 police officers[12] who claim that

[12] The claims of plaintiff Lodge 7 of the Fraternal Order of Police (the "FOP") were previously dismissed for lack of standing

defendant City of Chicago[13] committed racial or national origin discrimination in violation of 42 U.S.C. § 1983 by adjusting scores on the 1985-88 examination based on the race of the test taker ("racial standardization"). The adjustments favored African-Americans and Hispanics. All or most of the individual plaintiffs are non-Hispanic Whites. The plaintiffs also complain that defendant discriminated by promoting Hispanics and women[14] out of the order in which they were ranked based on the racially standardized test.[15] Defendant does not dispute that it intentionally provided favorable treatment to African Americans, Hispanics, and women. One of its defenses, however, is that such treatment was justified as a narrowly tailored remedy for the Police Department's past unlawful discrimination against African-Americans, Hispanics, and women. Presently before the court are both sides' motions in limine seeking the application of collateral estoppel as to certain issues. Also pending is plaintiffs' motion to reconsider a discovery ruling regarding an expert witness of defendant.

For purposes of discovery only, this case was consolidated with three cases alleging discrimination in other Chicago

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and mootness. See Petit v. City of Chicago, ___F. Supp. 2d ___ , 1998 WL 919716 *10-11 (N.D. Ill. Sept. 11, 1998) (Petit II") .

[13] Other defendants were previously dismissed. See Petit v. City Of Chicago, 766 F. Supp. 607, 614-16 (N.D. Ill. 1991) ("Petit I").

[14] For brevity in writing, race or racial will be used generically to refer to the race, national origin, and gender issues involved in this case.

[15] Plaintiffs' claims are limited to being pursuant to § 1983. See Petit II, 1998 WL 919716 at *1 n.4; Petit I, 766 F. Supp. at 613.

Police Department promotions. While still consolidated, defendant's motion to substitute an expert witness was denied. After completion of the consolidated proceedings, defendant renewed its motion to substitute. On September 23, 1998, the renewed motion to substitute was granted. Plaintiffs presently seek reconsideration of that order. In other words, as matters now stand, the City will be permitted to use Bernard Siskin as an expert witness. Plaintiffs seek to preclude the use of Siskin as a witness.

Expert testimony is likely to be important in this case Defendant had employed Charles Mann as an expert and there is no dispute that the City's intent to use Mann was properly and timely disclosed a number of years ago. Defendant's relationship with Mann, however, has deteriorated and defendant now intends to use Siskin as an expert. Siskin's report was provided to plaintiffs no later than September 28, 1998, and possibly much earlier than that.[16] Presently, the parties' final pretrial order is scheduled to be submitted on March 18, 1999. Plaintiffs will have had Siskin's report for nearly six months, if not longer, by the time the final pretrial order is due. The trial will not take place until sometime after the final pretrial order is submitted. Additionally, plaintiffs were provided a sufficient period of time in which to depose Siskin.[17] Plaintiffs" present motion does not make any

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[16] It was unclear from the prior presentation whether the report had already been disclosed. The September 23 Order required that the report be disclosed by September 28 if it had not already been disclosed.

[17] Plaintiffs apparently did not depose the prior expert and counsel indicated at a court hearing that plaintiffs may not desire to depose the new expert even if he is permitted to testify. Since the expert must provide a report, deposing the expert is often

showing of having suffered prejudice other than to conclusorily assert numerous hours were devoted to analyzing Mann's report and that it will be an "enormous task" to analyze Siskin's report. This is no more than had previously been asserted.

Plaintiffs have not shown sufficient prejudice to justify denying the use Of Siskin. Unlike the decision made by the judge supervising the consolidated case, the September 23 decision to allow substitution and today's denial of reconsideration are made in light of the specific schedule set for this specific case. Plaintiffs will have had a more than adequate opportunity to evaluate Siskin's report and any deposition testimony he may have given. Plaintiffs cite Erwin v. City of Chicago, 1998 WL 801821 (N.D. Ill. Nov. 12, 1998), one of the formerly consolidated police promotion cases. Applying Fed. R. Civ. P. 60(b), substitution of the expert was denied in Erwin. However, Rule 60(b) only applies to judgments and other final orders, not interlocutory discovery rulings. See Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1469-70 (4th Cir. 1991); Wimberly v. General Motors Corp., 1997 WL 30960 *1 (N.D. Ill. Jan. 17, 1997); Acme Printing Ink Co. v. Menard, Inc., 891 F. Supp. 1289, 1294-95 (E.D. Wis. 1995); Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 148-49 (S.D. Ind. 1993); Ruehman v. Village of Palos Park, 842 F. Supp. 1043, 1062-63 (N.D. Ill. 1993), aff'd, 34 F.3d 525 (7th Cir. 1994). This court has inherent and discretionary authority to reconsider its discovery rulings and modify them in light of the circumstances of the case. Absent substantial prejudice to plaintiffs, defendant should not be limited to

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unnecessary and may be more helpful to the expert than the opposing party.

using an expert identified years ago and with whom defendant is now having problems. Plaintiff's reconsideration motion will be denied.

Defendant seeks to estop plaintiffs from disputing that, during the decades prior to 1989, the Chicago Police Department engaged in intentional discrimination against African-Americans and Hispanics who applied for or were hired as police officers. Defendant's basis for applying collateral estoppel are findings supporting the judgment entered in Majeske v. City of Chicago, No. 89 C 7262 (N.D. Ill.). The pertinent findings are reported in Majeske v. City of Chicago, ___ F. Supp. 2d ___ , 1998 WL 831889 (N.D. Ill. Nov. 25, 1998). Post judgment motions for reconsideration and a new trial were denied on December 9, 1998 and Majeske is presently on appeal before the Seventh Circuit.

Majeske is one of the cases that was consolidated with the present case for discovery. Majeske concerns 1990 promotions to detective that were based in large part on a 1989 examination. The Majeske plaintiffs, who are White current and former Chicago police officers, are represented by the same attorney who represents plaintiffs in the present case. Nineteen of the plaintiffs in the present case are also plaintiffs in Majeske. Two plaintiffs in the present case who are not Majeske plaintiffs testified in the Majeske case as witnesses for the plaintiffs.

In Majeske, the parties agreed to present 28 pairs of questions to the jury in a special verdict. Each pair of questions asked whether the City had presented evidence to support its side of the question and if the plaintiffs had proved their side of the question by a preponderance of the evidence. The parties agreed the court could make a legal determination

based on the findings contained in the special verdict, with it also being agreed that, if necessary, the court could make any additional findings of fact not resolved by the special verdict. Based on the findings made by the jury, the court concluded that there had been past discrimination by the Police Department including discrimination in promoting African-Americans and Hispanics to the detective rank. It was also found that the favorable treatment provided to African-Americans and Hispanics during the 1990 detective promotions was a narrowly tailored remedy for the discrimination against African-Americans and Hispanics that had been shown. Accordingly, the City prevailed in the Majeske case.

In the present case, the City specifically relies upon the Majeske jury's affirmative responses to the following questions:

> 5. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black police officers were subject to intentional, unfavorable treatment in assignments (for example, segregated beats, restricted duties, and unfair efficiencies)?[18]
>
> 6. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, black and Hispanic police officers were subject to intentional, unfavorable treatment in hiring (for example, in the use of medical and entrance qualifications)?

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[18] The "efficiencies" referred to in question 5 are efficiency ratings, which are performance evaluations.

7. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, supervisors (for example, sergeants, lieutenants, commanders, etc.) in the Police Department acted in ways that were hostile to black and Hispanic police officers?

7.5. Did the City present evidence to support its claim that, in the decades prior to the 1989 detective examination, the Police Department tolerated acts of hostility directed towards black and Hispanic police officers?

Majeske, 1998 WL 831889 at *3-4. As to each of these questions there was a corresponding question as to whether plaintiffs had proved by a preponderance of the evidence the negative of the proposition. The jury answered "No" as to each of the corresponding questions. Id. at *4.

As summarized by the court:

> [T]he jury found defendant presented evidence of past discrimination in the hiring and promotion to detective of Chicago police officers. . . . Based upon the jury's findings and the evidence underlying those findings, the court finds defendant had a strong basis in evidence for concluding past discrimination existed . . . . Accordingly, it is plaintiffs' burden to establish that defendant's evidence did not constitute strong evidence of discrimination. . . .
>
> The jury found plaintiffs failed to prove by a preponderance of the evidence any of the facts set forth in the special verdict relevant to the question of whether there was strong evidence of discrimination.

> Plaintiffs accordingly have not borne their burden of establishing that defendant's evidence did not constitute strong evidence of discrimination

Id. at *5.

Defendant seeks estoppel on limited issues. It seeks to estop plaintiffs from disputing that the City subjected African-American and Hispanic police officers to (a) unfavorable treatment in assignments; (b) unfavorable treatment in hiring; (c) hostile treatment by the Department; and (d) tolerance of hostile treatment.[19] Defendant does not contend that the Majeske finding that there was past discrimination in promotions to detective would be relevant to the present case. Defendant also concedes that the question of past discrimination in promoting African-Americans and Hispanics to sergeant would still be an open question for trial.

Favorable treatment to a racial or ethnic group is permitted where there is past discrimination and the remedy is narrowly tailored to the violation, that is the discrimination against the formerly favored group is kept to the minimum amount consistent with effective remediation. McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir.), cert. denied, 119 S. Ct. 444 (1998); Majeske, 1998 WL 831889 at *2. Defendant has the initial production burden of showing a strong basis in the evidence that past discrimination existed. The burden of persuasion, however, remains with plaintiffs to show either that past discrimination did not occur or that the remedy is not tailored narrowly enough. Contractors

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[19] The Majeske opinion does not clarify whether this refers only to tolerance of hostile treatment by fellow officers or also tolerance of hostile treatment by citizens or others.

Association of Eastern Pa., Inc. v. City of Philadelphia, 91 F.3d 586, 597 (3d Cir. 1996), cert. denied, 117 S. Ct. 953 (1997); Concrete Works of Colorado, Inc. v. Denver, 36 F.3d 1513, 1521-22 (10th Cir. 1994), cert. denied, 514 U.S. 1004 (1995); Majeske, 1998 WL 831889 at *2-3. A strong basis in the evidence has been described as evidence approaching a prima facie case of a constitutional or statutory violation. Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13, 19 (1st Cir. 1998); Aiken v. City of Memphis, 37 F.3d 1155, 1163 (6th Cir. 1994); Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1553 (11th Cir. 1994).

Four elements must be satisfied in order to apply collateral estoppel based on a prior federal court judgment.

> 1) the issue sought to be precluded must be the same as that involved in the prior action, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action.

La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900, 905-06 (7th Cir. 1990).

Plaintiffs contend the first two elements are not satisfied because Majeske did not find intentional discrimination or discrimination in promotion to sergeant. As to the first contention, plaintiffs point to the court's language on page *5 of Majeske, which refers to "discrimination, not expressly to "intentional discrimination." That finding, however, was based on jury findings of evidence to support "intentional, unfavorable treatment." Id. at *3-4. More specifically, Majeske found that the same "strong basis" standard that

would apply to the present case was satisfied. It is clear that Majeske found that there was a strong basis in the evidence of intentional discrimination.

It is true that, in Majeske, the City had to show past discrimination in promotion to detective, whereas the present case requires a showing of past discrimination in promotion to sergeant. Past intentional discrimination in the hiring and treatment of patrol officers, however, is part of the evidence in the present case that there was past discrimination in the promotion of African-Americans and Hispanics to the rank of sergeant. In Majeske, it was found that there was strong evidence of discrimination in hiring and treatment of patrol officers and that there was discrimination in promotions to detective. Estoppel is only sought as to the former. The City will still have to present evidence linking discriminatory treatment of patrol officers to discrimination in promotions. Plaintiffs, however, will be precluded from denying the patrol officer discrimination proven in Majeske.

Plaintiffs conclusorily assert that the third and fourth estoppel elements are not satisfied. Since these assertions are not supported by any legal argument, they are waived. See Griffin v. City of Milwaukee, 74 F.3d 824, 828 (7th Cir. 1996); Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990), cert. denied, 506 U.S. 985 (1992); Gold v. Wolpert, 876 F.2d 1327, 1333 (7th Cir. 1989). Even if not waived, these contentions lack merit. Majeske being on appeal does not preclude it from being a final judgment that can be accorded a collateral estoppel effect. See Amcast Industrial Corp. v. Detrex Corp., 45 F.3d 155, 160 (7th Cir.), cert. denied, 515 U.S. 1103 (1995) (dictum); Prymer v. Ogden, 29 F.3d 1208, 1213 n.2 (7th Cir.), cert. denied, 513 U.S. 1057 (1994) (dictum noting that "it is clear that the [Seventh Circuit] has adhered to the general rule in American

jurisprudence that a final judgment of a court of first instance can be given collateral estoppel effect even while an appeal is pending"); Williams v. Commissioner of Internal Revenue, 1 F.3d 502, 504 (7th Cir. 1993) (dictum); Charles A. Wright, Arthur R. Miller.& Edward H. Cooper, Federal Practice & Procedure § 4433 at 308-10 (1981).[20] Although not all the plaintiffs were parties to MaJeske, 19 of the present plaintiffs were plaintiffs in Majeske, the same attorney represents the plaintiffs in both cases, and the prior history of consolidated discovery means that the available evidence regarding past discrimination is the same for both cases. Under these circumstances, it is appropriate to treat the plaintiffs in the present case as being in privity with the Majeske plaintiffs. See Petit I, 766 F. Supp. at 610-13. See also Monfils v. Taylor, ___ F.3d ___ , 1998 WL 890371 *10-11 (7th Cir. Dec. 23, 1998); Tice v. American Airlines, Inc., 162 F.3d 966, 971-73 (7th Cir. 1998).

At trial, plaintiffs will be precluded from disputing that, during the decades prior to 1989, (a) African-American patrol officers were subject to intentional, unfavorable treatment in assignments; (b) African-Americans and Hispanics were subjected to intentional, unfavorable treatment in hiring for patrol officer positions; (c) supervisory police officials acted in ways that were hostile to African-American and Hispanic patrol officers; and (d) the Chicago Police Department tolerated acts of hostility directed toward African-American and Hispanic patrol officers. The Majeske case contains no specific findings as to the extent of these types of discrimination. To the extent genuine disputes exist and it would be relevant, plaintiffs are not precluded from

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[20] The parties do not discuss whether prudential reasons exist for granting a stay of this case during the Majeske appeal.

presenting evidence that the extent or frequency of discrimination was less than that claimed by the City. However, during preparation of the final pretrial order, the parties are to act in good faith in attempting to reach stipulations as to the pre-June 1989 discrimination. Additionally, to the extent relevant, plaintiffs are not precluded from presenting evidence to support any contention that the aforementioned conduct did not exist from June 1989 through September 1991.

Plaintiffs also move in limine for application of collateral estoppel based on other discrimination cases involving hiring, promotions, and demotions by the Chicago Police Department. Without much elaboration, plaintiffs cite six holdings or findings from five different published opinions, three of the opinions being rulings at various stages of a single case. The cases cited are: (1) United States v. City of Chicago, 385 F. Supp. 543 (N D. Ill. 1974)("Chicago I") (preliminary injunction ruling); (2) United States v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976) ("Chicago II"), aff'd in part, rev'd in part & remanded, by (3) United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) ("Chicago III"), cert. denied, 436 U.S. 932 (1978) ; (4) Cygnar v. City of Chicago, 865 F.2d 827, 832 (7th Cir. 1989); and (5) Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990) (en banc) ("Auriemma I"), cert. denied, 501 U.S. 1204 (1991).

In Chicago III, the Seventh Circuit upheld district court findings made in Chicago II that a December 1971 patrol officer hiring examination and August 1973 sergeant promotional examination had disparate impacts on minorities and were not job-related. Chicago III, 549 F.2d at 427-34. It was also held that there was no evidence of intentional discrimination and therefore findings of a constitutional

violation were reversed.[21] Id. at 435. Citing the latter holding, plaintiffs assert that defendant should be estopped from contending there was intentional discrimination in the past. That holding, however, is not a basis for applying collateral estoppel because it was not essential to the judgment in the Chicago cases. The injunctive relief and backpay relief ultimately awarded in the Chicago cases was not affected by the race discrimination violations being limited to Title VII violations and not constitutional violations. Estoppel will not be applied based on the cited holding in Chicago III.

Plaintiffs also cite Chicago II as holding that there was no discrimination in performance evaluations, Chicago II, 411 F. Supp. at 238-39, and no discrimination in assignments, id. at 241. The first finding pertains only to a six-month period from January through June of 1973. It was found that the one-point difference between the average ratings of Whites and African-Americans was too slight to support any related relief. Id. at 238-39. As to assignments, it was found that some abuses existed in the assignment of minority officers to particular areas, but the "overall disparity" as to where minorities were assigned was not high enough "to give rise to a finding of discrimination." Id. at 241.

Both sides ignore that the City prevailed on these two issues and therefore judicial estoppel, not collateral estoppel, would be the appropriate doctrine to invoke. Czajkowski v. City of Chicago, Ill., 810 F. Supp. 1428, 1435 (N.D. Ill.

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[21] Between the issuance of the district court's findings in Chicago II and the Seventh Circuit's decision in Chicago III, the Supreme Court decided Washington v. Davis, 426 U.S. 229 (1976), making it clear that intentional discrimination was required for there to be a constitutional violation. See Chicago III, 549 F.2d at 435.

1992). Not only do plaintiffs fail to make any argument regarding judicial estoppel, they fail to respond to the collateral estoppel arguments the City makes specifically regarding these two issues. The burden is on the party invoking estoppel to show that all its elements are satisfied. Kulavic v. Chicago & Illinois Midland Ry. Co., 1 F.3d 507, 517 (7th Cir. 1993); La Preferida, 914 F.2d at 906; Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 18 F. Supp. 2d 297, 301 (S.D.N.Y. 1998). Plaintiffs have not satisfied their burden. Estoppel will not be applied as to these two issues.

Citing Chicago I and Chicago II, plaintiffs state that"Before 1975, the City did not allow women to become patrol officers." The City contends that the requirements for collateral estoppel are not satisfied, but represents that it will stipulate to this fact and that such discrimination was intentional. The City will be estopped from contending that women were permitted to be patrol officers prior to 1975.

Citing Cygnar, 865 F.2d at 832, plaintiffs contend: "In 1984, the year after Harold Washington became mayor, the City reduced the number of white police officers in the Office of Municipal Investigations [OMI] unit from 28 to 15, and transferred in 13 blacks, and the court determined that this conduct was racially discriminatory against whites." The City's only response is that this would not estop the City from demonstrating that it intentionally discriminated against African-Americans and Hispanics in the 1950's, 1960's, and 1970's. Since the City does not make any argument as to why it should not be estopped from denying the facts about what happened in OMI in 1984, the City will be so estopped However, no opinion is expressed regarding whether such evidence will be relevant or admissible at trial.

Plaintiffs cite Auriemma I, 910 F.2d at 1451, for the proposition that: "In 1983, Harold Washington appointed a black [Chicago Police Department] Superintendent, Fred Rice, [who] demoted 25 white officers from exempt positions, demoted no blacks, and promoted 13 blacks to exempt positions." As with the Cygnar assertion, defendant responds that this does not estop the City from proving past discrimination. Defendant also asserts, without any support, that the defendants prevailed in the Auriemma trial. Plaintiffs respond, without any support, that: "The City had prevailed because the positions at issue were not career service positions, but rather "exempt, or command, positions, subject to the discretion of the superintendent. Further, the City had settled with some of the plaintiffs in that case before trial." Although not cited by either side, Auriemma v. City of Chicago, 747 F. Supp. 465 (N.D. Ill. 1990) ("Auriemma II"), aff'd, 957 F.2d 397 (7th Cir. 1992) ("Auriemma III"), granted summary judgment in favor of the City on the ground that any discriminatory conduct of Rice was not pursuant to a municipal policy or custom. Auriemma II and Auriemma III do not set forth the final resolution of the claims against Rice in his individual capacity.[22]

Auriemma I, cited by plaintiffs, recites the demotions and promotions referred to by plaintiffs. However, Auriemma I only addressed the question of whether Superintendent Rice was entitled to summary judgment based on qualified immunity, holding that he was not entitled to qualified immunity on the § 1983 race discrimination claims. 910 F.2d at 1454-57. Auriemma I does not address the merits of the discrimination claim and it is not a final resolution of the

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[22] It is possible that judgments against Rice could be used to estop the City. Cf. Monfils, 1998 WL 890371 at *11.

Auriemma case. See Auriemma I, 910 F.2d at 1457 ("What in fact happened is another matter. The case now goes to a jury so that it can decide whether plaintiffs' allegations are true."). Again, plaintiffs fail to satisfy their burden of showing a final judgment and findings that were essential to the final judgment. No estoppel effect will be accorded to any factual statements contained in Auriemma I.

IT IS THEREFORE ORDERED that:

(l) The ruling date of February 11, 1999 is vacated.

(2) Plaintiffs' motion to reconsider the order allowing the City's renewed motion to substitute expert witness [218-1] is denied.

(3) Defendants motion in limine based on collateral estoppel [221-1] is granted in part and denied in part. At trial, plaintiffs will be precluded from disputing that, during the decades prior to 1989, (a) African-American patrol officers were subject to intentional, unfavorable treatment in assignments; (b) African-Americans and Hispanics were subjected to intentional, unfavorable treatment in hiring for patrol officer positions; (c) supervisory police officials acted in ways that were hostile to African-American and Hispanic patrol officers; and (d) the Chicago Police Department tolerated acts of hostility directed toward African-American and Hispanic patrol officers.

(4) Plaintiff's motion in limine to find the City is bound by previously decided matters through collateral estoppel [228-1] is granted in part and denied in part. At trial, the City will be precluded from- (a) contending that women were permitted to be patrol officers prior to 1975 and (b) denying that, in 1984, the year after Harold Washington became mayor, the City

reduced the number of white police officers in the Office of Municipal Investigations unit from 28 to 15, and transferred in 13 African-Americans, and that this conduct was racially discriminatory against whites.

(5) Submission of final pretrial order reset from March 18, 1999 to April 27, 1999 at 11:00 a.m.

ENTER:

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: FEBRUARY 2, 1999

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 668

IN THE MATTER OF)
CHICAGO POLICE OFFICER PROMOTIONS)
)
CONSOLIDATED PRETRIAL PROCEEDING)
)

The deposition of **LeROY MARTIN**, taken in the above-entitled cause before Lucia R. Block, a notary public within and for the County of Cook and State of Illinois, taken pursuant to the Federal Rules of Civil Procedure for the United States District Courts, at 300 West Washington Street, Suite 1200, Chicago, Illinois, on the 8th day of April, 1998, at the hour of 10:00 a.m.

[Page 63]

that there were an insufficient number of African-Americans to do the jobs in narcotics, African-American patrolmen, or whatever ranks?

A. No, that was never a factor.

Q. Was that a factor, as far as you know, in any -- an operational factor in the Chicago Police Department at any

time that -- from the time you were a commander up until the time you left the department in '92?

A. Yes. We had some units where we had problems with the makeup of the work force.

Q. What units were they?

A. These were mainly detective division.

Q. When you say you had problems, what do you mean by that?

A. It was that unfortunately we have a very, very diverse population that live in enclaves -different ethnic groups live in different locations, and it's necessary for to you make some assignments based on race.

Q. For example -- you specified the detective unit as one example. Why do you specify detectives?

A. They had to do work in neighborhoods where obtaining information would be extremely difficult if

[Page 64]

you didn't blend into that community.

Q. Were these undercover or just regular - -

A. These are -- some of them were just regular officers.

Q. But you determined -- when I say you, I mean the department determined that you needed an African-American detective in a certain area?

A. Yes, we did.

Q. Were there points in time where it was hard to fill the detective spots with African-Americans?

A. Extremely hard.

Q. Why was that?

A. It's that we just weren't getting enough off of the list to make our work assignments.

Q. A detective was based on a competitive exam?

A. That's correct.

Q. Anybody who was a patrolman could take the detective exam?

A. That's correct.

Q. When you say there were insufficient detectives, you mean there were insufficient numbers of African-Americans ranking high enough on those eligibility lists?

A. That's correct.

[Page 124]

MS. SUTHERLAND: I'm going back to Woodlawn, his assignment in Woodlawn.

BY MS. SUTHERLAND:

Q. You said that the dispatcher -- you observed a pattern that the dispatcher would not send black officers to the white section of that district, is that correct?

A. That is correct.

Q. Did you ever complain about that?

A. No, ma'am.

Q. So you think it's wrong to assign officers to neighborhoods according to the race of the people in the neighborhood?

A. No. I think that there is a time where that has a place, but depending upon your duty assignment. But just from normal patrol work, uniformed officers, I believe they can work or be assigned anywhere.

Q. Okay. So blacks can be assigned to do patrol work in white neighborhoods?

A. That is correct.

Q. And then white officers can be assigned to do patrol work in black neighborhoods?

A. That is correct.

[Page 125]

Q. Okay. What particular -- I know you mentioned some assignments for detectives. What other assignments -- what kind of assignment are you saying that --

A. The tactical officers --

(Short interruption.)

BY MS. SUTHERLAND:

Q. Let me finish my question.

MR. KINGSLEY: Yeah, let her --

BY MS. SUTHERLAND:

Q. What assignments are you saying should be made -- should the race of the officers be taken into account in your opinion?

A. Tactical officers.

Q. Why don't you explain what tactical officers are.

A. I beg your pardon?

Q. Can you explain for the record what tactical officers --

A. Tactical officers are a group of officers that work in the district, but they're assigned to civilian dress clothes. They do some follow up, but mostly they work on gangs and narcotics, within that particular district.

[Page 126]

Q. Okay.

A. And as a tactical officer occasions are that you have to go out and make actual buys of narcotics from street dealers.

Q. Any other assignments that you feel race should be a factor?

A. Well, yeah, race -- as superintendent, he has to take race in consideration in making assignments of a work force.

At the present day, although my superintendency has expired and another one has come through, there are no black commanders assigned to white communities. All the black commanders in the Chicago Police Department that are field commanders are assigned to black communities. That is being done because the superintendent feels that an ethnic officer will be more effective in an ethnic community. He lives there, and he'll get along better with people of his own race.

Q. What do you mean by "field commander"?

A. District commanders. Police stations in communities -- those are field stations, and we have district commanders that head each one of these 25 police stations. And we have made an effort to assign

[Page 127]

black commanders to black communities, white commanders to white communities.

And we have found because of the racial makeup and the enclaves that people live in that the people communicate better with these commanders than they would other people.

Q. So you're saying people communicate with the district commanders?

A. Black people communicate better with a black district commander than they do with a white one. The black one goes to the church in that community. He lives in a black community, and he relates better.

Q. Okay. In what situations, other than church, does a normal citizen --

A. Crime.

Q. Let me just finish the question.

Does a normal citizen communicate with a district commander?

A. If you live in a community that was African-American, where you had high gang activity and high narcotic activity, you probably wouldn't march into the station and report this to the white commander. But if you had a black one there, you would be more likely to communicate this information to him

[Page 128]

or her.

Q. So you're saying the district commanders spend their time in the stations?

A. They spend their time in their districts.

Q. Where in the district?

A. All over the district. Community meetings in their district, outside of their district. They patrol their district. We give them a car to patrol their district to monitor the conditions of that district.

Q. Okay. Any other assignments that you're saying race should be a factor?

A. Undercover assignments. I wouldn't advise you to take a white officer and have him try to infiltrate the Muslims. I wouldn't advise you to take a black officer and ask him to infiltrate the Ku Klux Klan. Race becomes a factor if you're going to be successful at providing public safety for your citizens.

Q. What's the difference between an undercover assignment and a tactical --

(Short interruption.)

BY MS. SUTHERLAND:

Q. What's the difference between an undercover assignment and a tactical assignment?

[Page 129]

A. A tactical officer is restricted to his particular police district. He doesn't do much undercover work. Some, but not a great deal.

An undercover officer usually is assigned a car that doesn't look like a police car. He usually doesn't carry a weapon in his assignment, and he usually doesn't wear a bullet-proof vest in his assignment. And he has to use it to infiltrate the wrongdoers in that community.

Q. Okay.

A. And race becomes a factor.

Q. Okay. Is that -- have I exhausted your answer then on what assignments should be by race?

A. Yes, you have.

Q. Okay. When you were a superintendent, you had about 25 black exempts. How many--did you feel you had a sufficient number of district -- black district commanders to go to black communities?

A. Yes, I did.

Q. Was it all the 25 exempts that were going to the black communities, or was it just the district commanders?

A. No, just in the black districts, which there were around six or seven.

APPENDIX I

LIST OF PETITIONERS

Aikin, Lawrence; Aljinovic, Frank; Angelo, Dean; Apel, John F.; Bach, Chester; Bagans, Amy; Baio, John R.; Baldree, William; Barham, Fred; Barron, William; Barry, Donald J.; Barton, John; Bernacki, Gregory; Bernichio, Mary L.; Block, Arthur; Blomstrand, Thomas; Bobis-Morrison, Catherine; Bobko, John; Bond, Yolanda; Bonk, James; Bowery, Charles; Bowness, George W.; Brya, John M.; Buckendahl, Clifford; Buday, Annette L.; Budz, Edwin; Bugarin, Martin J.; Burauer, Carolyn; Burke, Daniel E.' Burke, John D.; Burke, Kenneth E.; Buslik, Marc S.; Carlson, Wayne; Carnevale, Eloise; Casey, Lawrence; Cassidy, James L., jr.; Cauble, Richard; Cavanaugh, James; Cesario, Louis; Chirello, Steven J.; Chudy, Eugene D.; Coghlan, John J.; Collins, Harry; Collins, Michael; Collins, Phillip; Colonna, Guido; Conley, Michael; Cosgrove, James P.; Cristoe, Craig W.; Crowell, David A.; Culver, Ralph; Cummings, James; Cunningham, Daniel; Cusack, Michael; Darcy, Patrick, J.; Darling, James P.; Davis, Lorlei; Davis, William B.; Deacy, Thomas; Dean-Labern, Linda S.; Degregorio, Dennis P.; Deheer, John R.; Delanty, John; Delia, John; Delia, Victor A.; Dixon, Daniel; Donahue, Mark P.; Duckhorn, James R.; Duffin, Kevin B.; Duffy, John J.; Duggan, Lawrence; Dunne, Michael; Dyrcon, Henry; Elmer, Richard; Engemann, Sandra; Erwin, John; Facchini, William; Falasz, Alan L.; Falbo, Angelo B.; Falkenberg, Robert; Fallon, Thomas C.; Fedanzo, Robert C.; Fiester, Barbara; Filipiak, William; Finocchio, Anthony D.; Fischer, John; Fitzgerald, Dennis P.; Fitzgerald, John;

Flaherty, Lenore; Flood, Thomas; Fluder, Jerome; Flynn, Charles E.; Forrester, Patrick; Frazin, Robert; Ganey, Gerald; Gawel, Bruno; Gawrys, Stephen; Geisbush, Gregory; Geraci, James J.; Glynn, James M.; Goga, James; Golden, Michael; Golnick, Raymond; Gooday-Steinmeier, G.A.; Goodrich, David W.; Gottlieb, George; Graf, Albert; Graffeo, Anthony F.; Gramza, George J.; Graziano, Philip; Grieb, William K.; Griffin, Edward; Grill, John A.; Groth, Michael J.; Haas, Kevin; Hacker, Robert G.; Haggard, James P.; Halko, Mark M.; Hansen, Gerald V.; Harris, William C.; Hawkins, Mark T.; Hayes, John; Healy, William P.; Henry, John; Hensly, Margaret; Hermann, John; Hill, Reginald; Hinman, Geraldine; Hinton, William; Hogan, James T.; Hohenstein, Ronald; Holmes; George F.; Holmes, Richard R.; Holub, Richard J.; Hrebenak, Milan; Hussey, John M.; Hycner, Chester; Jachna, Jacob; Jackson, William; James, Kathleen J.; Janda, John S.; Jankowski, Maryann; Jarmusz, David; Jin, Tony H.; Johnson, Kenneth G.; Johnson, Wayne A.; Karnick James; Keating, James; Kelly, Joseph P.; Kendzior, Edward; Kern, Alan J.; Kero, Robert A.; King, Richard; Kingsley, James C.; Klich, Robert H.; Koclanis, John P.; Kolerich, Evelyn; Kondal, Joseph J.; Konrath, Robert; Koop, Edward; Kovacs, William; Krieger, Garry J.; Krupa, Frank R.; Krupowicz, Kenneth A.; Krupowicz, Thomas E.; Kuehn, Lynn; Kuyken, James; La Bresh, Donald J.; Labbe, Robert M.; Lapinski, Rae; Lapinski, Richard H.; Lazzara, Kenneth J.; Leavy, John R.; Loffus, James R.; Lonergan, Thomas J.; Longley, Clarence; Lorenz, Sharon; Lynn, Timothy; Maas, Neil; Maderak, Dennis S.; Magliano, Michael P.; Magnus, Sheila M.; Maloney, James P.; Mangrum, Gail; Marchfield, Steven; Marcial, Thomas; Markulis, Andrew V.; Massey, Marshall; Masuda, Patrick; Matheson, Landon P.; Mathews, Terence; Mathey, James; Mattera, Pasquale W.; Matuszak, Harold; Mazzola, Raymond; McCarthy, H.A.; McCarthy, Patrick W.;

McDonough, James H.; McInerney, Daniel; McMaster, Kenneth H.; Mc Nally, James F.; Mcgrath, Donald P.; Medow, Brandon L.; Menegazzo-Rowan, Karen A.; Merriam, David M.; Milam, Mary Jo; Mitzner, Robert; Modesto, James V. jr.; Mondane, Michael; Moon, Robert S.; Moore, William E.; Morland, Clifford E.; Morrissey, Mark J.; Muczynski, Bruno J.; Muscolino, Robert J.; Myers, George H.; Navigato, Robert M.; Nichols-Risley, Linda R.; Nielson, John N.; Niemotka, Anthony J.; Novacich, Kenneth; Nowak, David; O'Boyle, Edward D.; O'Connell, James M.; O'Donohue, Daniel; O'Leary, James B.; O'Loughlin, Robert D.; O'Neill, Donald J.; O'Shea, Timothy; Oesterlin, Wayne; Olijnyk, Bohdan; Olivieri, Rose Ann; Orlando, Robert; Ozga, Joseph F.; Ozga, Loretta K.; Padgurskis, Charles; Pell, Francis G.; Petersen, Donald; Petit, Robert; Pierotti, Anthony; Pike, Larry; Pistello, Bernard A.; Posluszny, John; Povolo, James; Praski, Paul T.; Prieto-Webb, Laura M.; Psichalinos, Victoria; Ramirez, Mario J.; Raucci, Donna M.; Raye, Lewis R.; Redman, Charles A.; Rodgers, Michael; Schorsch, Steven R.; Rossi, Nick; Roussell, Roger; Rowan, Michael; Rubin, Richard A.; Rutherford, Robert; Salvi, Gregory A.; Scarriot, Elmer; Schaefer, John A.; Schaefer, Russell; Schulte, Peggy J.; Serritella, Anthony C.; Shannon, Edward W.; Shaw, Dennis R.; Sherman, Richard S.; Sherwin, Jack; Shimkus, Judith; Shogren, Ronald H.; Signoretti, Joseph R.; Siwak, Mary; Siwek, Edward; Siwek, Robert; Slakis, Alan; Smith, Charles; Smith, Dale M.; Smith, Roy; Sneed, Milton A.; Soltysiak, Raymond; Spencer, Cornelius; Stachula, Joseph; Stather, Michael; Stefan, Dorothy; Stella, John P.; Stephens,.Michael A.; Stoffregen, Alane; Strzechowski, Lawrence; Stube, Patricia A.; Suerth, David; Sullivan, Patrick F.; Surdej, Stanley F.; Swarbrick, Jerold; Sweeney, James; Sweeney, Michael L.; Swiderski, Edward; Swiderski, Robert A.; Szudarski, Allen E.; Talkowski, Marie; Tomasek, Frederick C.; Touhy, Richard;

Town, William; Tuider, Lawrence; Tunno, Eugene M.; Turney, John; Vercruyse, Dale R.; Vernagallo, Louis; Vetrovec, Donald; Voight, William; Vrtis, Stephen; Vukonich, Frank; Washington, Len; Wasowski, Richard; Waterloo, John E.; Webber, George; White, Alan; Whitters, William B.; Wicht, Darlene; Wiesinger, Maja; Winstead, Edward; Woitowich, William N.; Wright, Joyce; Young, Donna J.; Zotto, John R.; Zurawik, James

(2)

Supreme Court, U.S.
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No. 03-1458

In the

Supreme Court of the United States

ROBERT PETIT, et al.,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. The Fourteenth Amendment prohibits states from discriminating between individuals by race. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court held that a public university had a compelling educational interest in cultivating a racially diverse student body, and that the Court should defer to its academic freedom to create such a student body. Does *Grutter* also permit the city of Chicago to discriminate on the basis of race when promoting police officers?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of the petition for a writ of certiorari. Consent for the filing of this brief has been granted by counsel for all parties, and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation, organized under the laws of the State of California, for the purposes of engaging in litigation in matters affecting the public interest. For thirty years, PLF has litigated, and participated as amicus curiae, in both state and federal courts in numerous cases involving racial discrimination by the government, including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Gratz v. Bollinger*, 539 U.S. 244 (2003). PLF considers this case to be of special significance in that it concerns the government's authority to discriminate between individuals on the basis of race.

SUMMARY OF ARGUMENT

The petition should be granted for at least three reasons.

First, the decision below conflicts with the decisions of at least two other circuit courts, which have held that police departments may not discriminate on the basis of race in order to better conform to the racial prejudices of members of the community. *See Police Ass'n of New Orleans Through Cannatella v. New Orleans*, 100 F.3d 1159 (5th Cir. 1996);

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993).

Second, the decision below misapplies this Court's precedent on the issue of racial preferences. Those decisions have charted a relatively consistent course for half a century: government's power to discriminate on the basis of race is highly suspect, and is constitutional only in the most rare circumstances. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court upheld the University of Michigan's use of racial preferences in its admissions policies, after deferring to university officials' opinion that such preferences suited the school's educational mission.

The court below, however, held that *Grutter* also justified the City of Chicago's use of racial preferences in promoting police officers. The court held that the Chicago Police Department had a compelling interest in preferring minority members because civilians who are members of minority groups tend not to trust or cooperate with white police officers. "It seems to us," the court concluded, "that there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago." *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003).

This conclusion is not warranted by *Grutter*. That decision allowed racial preferences only in the context of the University's educational mission. Specifically, it deferred to the University's academic freedom to create a racially diverse educational atmosphere. It did not hold that government agencies may discriminate on a racial basis simply to conform to the racial prejudices of the surrounding community. In fact, this Court has repeatedly held that such conformity cannot justify unconstitutional discrimination, regardless of the supposed benefits to be derived from it.

Finally, the court of appeals' misconstruction of *Grutter* reveals the ambiguity of that decision, which only this Court can resolve. In the short time since it was announced, courts and commentators have emphasized that its holding might become a warrant for limitless state power to discriminate on the basis of race. If that is not to happen, this Court must grant certiorari to limit or to clarify *Grutter*.

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

This Court has never held that a police department may discriminate on the basis of race to better comport with the racial prejudices of members of the community. Indeed, the Court has held that a "City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

The court below, however, held that the Chicago Police Department could discriminate between police officers on the basis of race, because "[i]t seems to us that there is . . . [a] compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago." *Petit v. City of Chicago*, 352 F.3d at 1114. Citing *Grutter*, the court held that ensuring a racially diverse police department was as compelling an interest as ensuring a racially diverse student body at a university. Since the Chicago Police Department must deal with members of ethnic groups who might be unwilling to trust or deal with white police officers, the court held that the Police Department was justified in granting preferences to nonwhite

officers in order to encourage community trust and cooperation. *Id.*

Whether, and to what degree, a government agency may accede to community prejudices is an issue which the circuit courts of appeals have decided in different ways. The opinion below conflicts with decisions of the Fifth and Fourth Circuits, and possibly the Sixth Circuit as well. The Seventh Circuit, on the other hand, has held that in the context of prison discipline and community policing, such a justification is acceptable, and the Fourth Circuit has not overruled a decision permitting a race-based police promotion on the same rationale adopted by the court below. This confusion among the circuits can only be resolved by this Court.

In *Police Ass'n of New Orleans Through Cannatella v. New Orleans*, 100 F.3d 1159, the Fifth Circuit Court of Appeals struck down a police department's race-based promotion scheme. According to the police department, the scheme was intended "to give a better reflection of the racial composition of the city; 'more African-American supervisors could better supervise African-American officers who in turn were needed to relate to the larger African-American population.' " *Id.* at 1168 (citation omitted). The court, however, flatly rejected that: only "remedy[ing] past specific instances of discrimination" could justify racial preferences. *Id.*

Likewise, in *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993), the Fourth Circuit struck down a police department policy of giving promotions to officers on the basis of their race. This policy was based on the city's belief that a higher percentage of minority officers would increase the "cooperation and support from the citizens . . . . According to the City, effective law enforcement can only be accomplished . . . with a racially diverse police force, and the only way to achieve racial diversity is to promote officers on the basis of their race." *Id.* at 213. The court held that there was no

evidence to demonstrate that police departments actually increased their effectiveness through racial preferences, and expressed strong skepticism as to whether increased effectiveness would constitute a legitimate state interest: "we fear others could use this same rationale for a much less benign purpose. Such a result would promote racial polarization and the stereotypical view that only members of the same race can police themselves." *Id.* at 214.[2]

In *Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990), the Sixth Circuit held that a police department's race preference program violated the Fourteenth Amendment. The police department argued that the program was justified as a remedy for the department's past discrimination in hiring. The court found insufficient evidence to substantiate this argument. *See id.* at 1198. But the police department also provided evidence of prior racially-charged confrontations between police officers and members of the public. The court concluded that these "confrontations between minorities and nonminorities" did not prove past discrimination by the department, or that minority police officers were "underutilized"; instead they only revealed the racial pressures in the community at large. *Id.* at 1202. Bending to such racial pressures, however, was not a compelling government interest. *Id.* Racial confrontations in the community, the court held, "are the classical sociological factors identified by the Supreme Court when it concluded, as it did, that '[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.'" *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)). The Eleventh Circuit has also rejected an

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[2] In *Hayes*, the Fourth Circuit seemed to disclaim its earlier holding in *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), on the ground that *Talbert* "did not determine that the interest [in racial diversity] was sufficiently 'compelling' to justify racial classifications under the strict scrutiny standard . . . ." 10 F.3d at 213.

"effectiveness in a prejudiced society" rationale for racial discrimination, albeit not in the police context. *See Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 475 (11th Cir. 1999).

In addition to the promotion preferences at issue in this case, the Seventh Circuit has concluded that a single instance of a racial preference was a constitutional way to preserve prison discipline. In *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997), the court of appeals held that inmates in a prison modeled after a military boot camp were unlikely to follow the orders of a primarily white prison guard staff. *See id.* at 920. The court therefore permitted the race-based promotion of a single guard to the position of lieutenant, although it emphasized the narrowness of its decision:

> [W]e do not hold . . . that [the state] would have been entitled to take steps to make the racial composition of the security staff mirror that of the inmate population. That would have gone beyond the limits of demonstrable need. Nor do we hold or believe that prison authorities are entitled to yield to extortionate demands from prisoners for guards of their own race . . . . We also do not hold that race is (or is not) a proper factor to take into account in staffing an ordinary prison . . . . We hold only that on the record compiled in the district court, the preference that the administration . . . gave a black male applicant for a lieutenant's job on the ground of his race was not unconstitutional.

Id. at 920-21. The decision below did not cite *Wittmer*, or explain how its decision fit within *Wittmer*'s limitations.

In *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), the Fourth Circuit Court of Appeals upheld the use of race preferences in police promotions in order to "communicate better" with minority

members of the public, "cater to the public's desires," and to aid "crime prevention and solution" by encouraging "public respect and confidence in the police." *Id.* at 931. *See also Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002) (allowing police department to engage in race preferences out of efficiency concerns despite acknowledging that "allow[ing] discrimination on the basis that it was efficient or expedient would cause inroads into equal protection that the courts are unwilling to countenance").

Such division among, and even within, the circuits militates for the granting of this petition, especially after this Court's decision in *Grutter*. Lower courts need guidance as to whether the "diversity" rationale permits government agencies to discriminate on the basis of race in all of their operations, or whether that rationale extends only to educational institutions.

II

THE DECISION BELOW MISCONSTRUED THIS COURT'S DECISION IN *GRUTTER*

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), this Court held that all instances of government discriminating between people on the basis of race is subject to strict judicial scrutiny. *Id.* at 227. The Court explained that this was necessary because state racial discrimination of any sort is inherently suspect, since racial characteristics are almost never an appropriate consideration for the government. *See id.* at 216 ("the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' and subject to the 'most rigid scrutiny'; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose." (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Since the purpose of the

Fourteenth Amendment is to make good on the Declaration of Independence's principle that "all men are created equal," 1 Stat. 1 (1776), government discrimination on the basis of race must be regarded with the gravest suspicion.

Under strict scrutiny, the Court has identified two situations in which racial discrimination by the government was acceptable: imminent threats to public safety such as during war, *Korematsu, supra,* or remedying specific, documented past instances of racial discrimination by the government. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989). Otherwise, the Court has held that government had an affirmative duty to eliminate racial classifications.

Recently, this Court found a third situation to justify government racial discrimination. In *Grutter*, the Court deferred to the determination of public university officials that racial preferences were an acceptable method by which the government might ensure "a mix of students with varying backgrounds and experiences who will respect and learn from each other." 539 U.S. at 314. The court below held that "[u]nder the *Grutter* standards . . . the City of Chicago has set out a compelling operational need for a diverse police department." *Petit*, 352 F.3d at 1114. But *Grutter* does not apply here.

First, the context of that case reveals that the Court intended its holding to be limited to educational institutions. The decision repeatedly asserted the important "educational benefits" that University officials believed would be served by a racially diverse student body. *See Grutter*, 539 U.S. at 328. The Court underlined its "tradition of giving a degree of deference to a university's academic decisions," *id.*, and the relevance of "the Law School's proper institutional mission . . . ." *Id.* at 329; *see also Wygant*, 476 U.S. at 286 (opinion of O'Connor, J.) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at

least in the context of higher education, to support the use of racial considerations in furthering that interest."). *Grutter* permitted race and ethnic preferences in the context of a state law school in which school administrators believed a "critical mass" of minority students would protect them from feeling isolated, and would encourage them to participate, which in turn would lead to a more robust exchange of ideas in the classroom. *Id.* at 326-33.

Second, the educational-benefits rationale cannot apply in the context of police promotions. This Court made clear that the concept of critical mass did not depend on any set percentage of representation and was entirely distinct from the concept of racial balancing which is "patently unconstitutional." *Id.* at 330. The City of Chicago, however, has established a system of promoting police officers by "standardizing" examination scores to equalize the scores of certain minorities with other groups. This is nothing more than an effort in unconstitutional racial balancing.

Third, *Grutter* found that the University of Michigan's academic freedom, "grounded in the First Amendment," entitled it to a degree of autonomy from judicial interference. *Id.* at 329. The Court therefore deferred to the University's judgment in how to best educate and prepare its students, including using racial preferences in admissions. But police departments do not have such autonomy. They possess nothing akin to "academic freedom" which would entitle them to judicial deference, or any First Amendment right to a robust exchange of ideas. There are no educational benefits to be derived from the City's race preferences, and none of the considerations of "expansive freedoms of speech and thought" which the *Grutter* Court found so compelling. *See id.* Instead, the Police Department's rationale for race preferences is simply racial balancing—to achieve a particular representation of races without consideration of any factors other than race and without proof that the action is based on any identified past

discrimination by the government—to appease prejudiced members of the community.

Most importantly, however, *Grutter* contrasted the compelling government interest in purported educational benefits of "exposure to widely diverse people, cultures, ideas, and viewpoints," *id.* at 330, with "simply 'assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin' . . . which is patently unconstitutional." *Id.* at 329-30 (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)) The Police Department's asserted interest in relating to the community falls within the latter category.

The court of appeals held that the Police Department could use racial preferences to assuage "[d]istrust and a lack of confidence in the police" by minority groups in Chicago. *Petit*, 352 F.3d at 1115. In other words, the Department could discriminate in order to better conform to the prejudices of the community at large. This Court has certainly never permitted government discrimination for this purpose.

If "bowing to community prejudices" were a legitimate state interest, the Court would never have struck down the anti-miscegenation law in *Loving v. Virginia*, 388 U.S. 1 (1967), would not have allowed civil rights demonstrators to march in the streets of southern cities, *see Cox v. Louisiana*, 379 U.S. 536 (1965), or lent its aid to the integration of the University of Mississippi. *Meredith v. Fair*, 83 S. Ct. 10 (1962) (Black, Circuit Justice).

Indeed, if assuaging the racial prejudices of the community were a legitimate state interest, this Court would never have ordered desegregation. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958)

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is . . . this aim cannot be

> accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights.

(Quoting *Buchanan v. Warley*, 245 U.S. 60 (1917)). *See also Wygant*, 476 U.S. at 276 (plurality opinion) ("Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Bd. of Educ. . . . .*"); *James v. Bd. of Educ. of the Central Dist. No. 1 of Towns of Addison, et al.*, 461 F.2d 566, 575 (2d Cir. 1972) ("Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail."). In fact, the policy concerns at the heart of *Grutter*—namely, fostering a society where people learn to shed their prejudices and move toward true racial equality—actually clash with the Chicago Police Department's race preferences: these preferences do not teach the public to abandon their distrust of other races, but actually reward public prejudice.

The Police Department's asserted interest in efficient policing of the community differs widely from the educational interest in "diversity" which the Court found in *Grutter*, and reaches farther than this Court's decisions have ever warranted. Indeed, if conforming to community prejudice is a legitimate state interest, it is difficult to imagine what rationale would *not* justify racial discrimination. Unfortunately, the Seventh Circuit Court of Appeals is not the only court to apply *Grutter* broadly. In *Berkley v. United States*, 59 Fed. Cl. 675, 683 (2004), the Court of Federal Claims even suggested that *Grutter* would permit deference to racial discrimination by the military. This is extremely disturbing, considering that one of the major milestones of racial equality in this nation's history was the ending of racial discrimination by the military. *See Watkins v. United States Army*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris,

J., concurring) ("Today, it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions.").

These facts demonstrate the lower courts' serious need for guidance on the limits of *Grutter*'s rationale. In dissenting from the denial of certiorari in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 124 S. Ct. 556 (2003), Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, stated that he believed certiorari was warranted because the decision below had left standing a government decision to use race preferences in public contracting which rested on weak evidence of past discrimination. Lower courts therefore needed guidance as to whether *Grutter* had effectively overruled the *Croson* decision. *Id.* at 560. But this case militates even more strongly for this Court's review. While *Concrete Works* invoked the uncontroversial presumption that remedying past discrimination is a compelling government interest, this case significantly expands the range of "compelling interests" to be served by racial preferences. Rather than just remedying past discrimination, or preventing imminent public harm, or fostering an educational environment which will break down racial stereotypes, the court of appeals held that government may discriminate so as to better appease the prejudices of the community. The Court should grant review to clarify that *Grutter* does not warrant such an expansive role for racial discrimination, but that it is limited only to the context of educational institutions.

III

IF THE DECISION BELOW STANDS, *GRUTTER*'S RATIONALE WILL GROW INTO A LIMITLESS EXCEPTION TO THE EQUAL PROTECTION CLAUSE

In *Berkley, supra,* the Court of Federal Claims noted that "[a]lthough the education admissions process was the factual predicate in *Grutter*, strict scrutiny cases decided in the context of education have historically been analogized to other governmental actions." 59 Fed. Cl. at 683. This is precisely why this Court should grant review here.

In fact, *Grutter*'s educational context sharply distinguishes it from this case. The *Grutter* Court repeatedly emphasized the importance of the University's academic freedom to pursue its educational mission with little judicial interference, as protected by the First Amendment. *See, e.g.*, 539 U.S. at 306-07, 323-24, 328-29. But police departments, and government hiring policies generally, deserve no such deference. The principle of academic freedom is supported by such values as the freedom to explore new and unique viewpoints, and the encouragement of a "'wide exposure to [a] robust exchange of ideas.'" *Bakke*, 438 U.S. at 312 (plurality opinion) (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967)). These values are not applicable to a police department, the primary concern of which is preserving the health, safety, and welfare of the state, within the bounds of the Constitution.

Even if police departments are analogous to schools, however, the decision below is not warranted by this Court's decisions with regard to racial discrimination in schools. The rationale adopted by the court of appeals is essentially the same as the "role model" theory which this Court has already rejected in cases involving the hiring of public school teachers. *See Croson*, 488 U.S. at 497-98 (plurality opinion); *Wygant*, 476

U.S. at 274-76 (plurality opinion). The "role model" theory holds that "some black teachers might share a cultural heritage with black students that no white teacher does," and that there are "relevant differences between black and white teachers that make black teachers in some respects uniquely qualified to teach . . . ." Laurence H. Tribe, *American Constitutional Law* 1535 (2d ed. 1988). Likewise, the decision below holds that minority police officers are uniquely qualified on the basis of their race and "shared cultural heritage." *See further* Kirk O. Kolbo, *Leaving* Bakke, 51 Drake L. Rev. 715, 718-21 (2003) (explaining that *Grutter*'s "diversity rationale" is indistinguishable from "role model" rationale).

The "role model" theory is a "weak argument[ ] for discrimination . . . because of lack of substantiation and a well-nigh unlimited reach." *Wittmer*, 87 F.3d at 919-20. Like the "role model" theory, the decision below is unrelated to evidence of past government discrimination, and "allows the [city] to engage in discriminatory . . . practices long past the point required by any legitimate remedial purpose." *Wygant*, 476 U.S. at 275. The city's discriminatory program is ageless in its reach into the past, and timeless in its ability to affect the future. *See id.* at 276. Worse, the decision below, like the "role model" theory, "could be used to escape the obligation to remedy [discriminatory] practices . . . ." *Id.* If achieving "diversity" is an acceptable justification for racial discrimination by the government in contexts beyond the educational arena, where special concern for First Amendment protections of academic freedom were held to require judicial deference, it is difficult to imagine a principled stopping point for racial discrimination by government.

In any event, the decision below holds that the state may discriminate on the basis of race so as to serve the community's prejudices, and thereby increase the administrative effectiveness. This conclusion is inconsistent with decades of Supreme Court precedent, and stretches *Grutter* beyond its

proper context. More importantly, it threatens to undermine the purposes of the Equal Protection Clause.

If minority police officers must receive preferences because the community is prejudiced against white police officers, why would cities whose populations are prejudiced against black or Hispanic people not be allowed to discriminate against black or Hispanic police officers? The decision below holds that the police department may give special treatment to members of minority groups because some minority members of the community distrust white police officers due to bad experiences with white officers in the past. If this principle is allowed to stand, there is no reason a white neighborhood's residents could not demand to be served by only white officers because of their prejudices against minority police officers. If racial discrimination is permitted to one group, or in one case, simply to appease the public's prejudices, then racial discrimination will spread throughout society. *See Wygant*, 476 U.S. at 276 (warning that government race discrimination to appease social prejudices "could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students."); *cf.* Abraham Lincoln, *Fragment on Slavery* (1854) *in* 1 *Lincoln: Speeches And Writings* 303 (Library of America 1989) ("If A. can prove, however conclusively, that he may [discriminate against] B.—why may not B. snatch the same argument, and prove equally, that he may [discriminate against] A.?").

In *Wygant*, this Court declared that it "never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." 476 U.S. at 274. After *Grutter*, the continuing validity of the *Wygant* decision is open to question. The Court should take this opportunity to clarify

whether *Wygant*'s insistence remains valid law, or whether the rationale of *Grutter* extends beyond the educational context.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

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Respectfully submitted,

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